

**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1939**

**No. 19**

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**OKLAHOMA PACKING COMPANY, FORMERLY WIL-  
SON & CO., INC., OF OKLAHOMA, ET AL., PETI-  
TIONERS,**

*vs.*

**OKLAHOMA GAS & ELECTRIC COMPANY ET AL.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE TENTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED MARCH 15, 1939.**

**CERTIORARI GRANTED APRIL 17, 1939.**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

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OKLAHOMA PACKING COMPANY, FORMERLY WILSON & CO., INC., OF OKLAHOMA, ET AL., PETITIONERS,

vs.

OKLAHOMA GAS & ELECTRIC COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE TENTH CIRCUIT

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[fol. a]

[Caption omitted]

[fol. 1]

**IN UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA**

No. 1357. Equity

OKLAHOMA GAS AND ELECTRIC COMPANY, a Corporation;  
Oklahoma Natural Gas Company, a Corporation; W. T.  
Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C.  
Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp, the  
Directors of the Oklahoma Natural Gas Company, a Dis-  
solved Corporation, and Oklahoma Natural Gas Corpora-  
tion, Complainants,

vs.

OKLAHOMA PACKING COMPANY, FORMERLY WILSON & COM-  
PANY, INC., OF OKLAHOMA, an Oklahoma Corporation;  
Wilson & Company, Inc. of Oklahoma, a Delaware Cor-  
poration; The Corporation Commission of the State of  
Oklahoma, Paul Walker, Chairman; C. C. Childers, and  
E. R. Hughes, Members of Said Commission, and J.  
Berry King, Attorney General of the State of Oklahoma,  
Defendants.

BILL OF COMPLAINT—Filed May 20, 1932

Oklahoma Gas and Electric Company, a corporation,  
Oklahoma Natural Gas Company, a corporation, W. T.  
Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts,  
R. W. Hannan, A. W. Leonard and R. C. Sharp, the Direc-  
tors of the Oklahoma Natural Gas Company, a dissolved  
corporation, and Oklahoma Natural Gas Corporation, Com-  
plainants herein, bring this bill of complaint against The  
Corporation Commission of the State of Oklahoma, Paul  
Walker, Chairman, C. C. Childers and E. R. Hughes, mem-  
bers of said Commission, J. Berry King, Attorney General  
of the State of Oklahoma, Oklahoma Packing Company,  
formerly Wilson & Company, Inc. of Oklahoma, an Okla-  
homa corporation, Wilson & Company, Inc. of Oklahoma,  
a Delaware corporation, and each of them, and allege and  
aver the following:

[fol. 2]

## I

Complainant, Oklahoma Gas and Electric Company, is a domestic corporation organized under the laws of the State of Oklahoma, and was at all times hereinafter mentioned engaged in and duly authorized to engage in the gas and electric business as a public utility.

## II

Complainant, Oklahoma Natural Gas Company, at the times hereinafter mentioned was a corporation engaged in and duly authorized to engage in the business of producing, conveying and selling natural gas as a public utility within the State of Oklahoma; that the said Oklahoma Natural Gas Company is a dissolved corporation; that W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp are the Directors of the Oklahoma Natural Gas Company duly authorized by law to sue or to be sued in winding up the affairs of the said Oklahoma Natural Gas Company.

Complainant, Oklahoma Natural Gas Corporation, is a corporation organized under the laws of the State of Maryland and engaged in the business of the production, transportation and sale of natural gas as a public utility within the State of Oklahoma and is the successor in interest of the said Oklahoma Natural Gas Company.

The Corporation Commission of Oklahoma is, and was at all times hereinafter mentioned, an administrative body created by the Constitution of the State of Oklahoma, having its offices and headquarters and principal place of business in the City of Oklahoma City, Oklahoma County, State of Oklahoma, and within the jurisdiction of the District Court of the United States for the Western District of Oklahoma, and the defendants, Paul Walker, C. C. Childers and E. R. Hughes are, and at all times hereinafter mentioned were, the duly elected, qualified and acting members of the Corporation Commission of the State of Oklahoma, with their headquarters in Oklahoma City, Oklahoma County, State of Oklahoma; and J. Berry King is, and was at all times hereinafter mentioned, the duly elected, qualified and acting Attorney General for the State of Oklahoma, with his official headquarters in Oklahoma City, Oklahoma County, State of Oklahoma, and within the jurisdiction of the District Court of the United States for the



Western District of Oklahoma, and under and by virtue of [fol. 3] the laws of the State of Oklahoma is and was at all times hereinafter mentioned, the duly authorized, qualified and acting attorney for said Corporation, Commission of the State of Oklahoma.

The defendant, Oklahoma Packing Company, formerly Wilson & Company, Inc. of Oklahoma, an Oklahoma corporation, is a corporation duly organized under the laws of the State of Oklahoma heretofore with its principal place of business in Oklahoma City in the County and State of Oklahoma, and at the times hereinafter mentioned was engaged in operating a packing plant for the production, sale and manufacture of meats, meat products, and such other incident and allied products as are usually manufactured and sold by the larger packing plants in the United States.

The defendant, Wilson & Company, Inc. of Oklahoma, a Delaware corporation, is a corporation duly organized under the laws of the State of Delaware, and on or about the 3rd day of December, 1931, there was transferred by said Wilson & Company, Inc. of Oklahoma, the Oklahoma corporation, to said Wilson & Company, Inc. of Oklahoma, the Delaware corporation, the packing business and plant and the assets and choses in action of said Wilson & Company, Inc. of Oklahoma, the Oklahoma corporation, and ever since said 3rd day of December, 1931, said Wilson & Company, Inc. of Oklahoma, the Delaware corporation, has been and is engaged in and is continuing and carrying on the business heretofore conducted and carried on by said Wilson & Company, Inc. of Oklahoma, the Oklahoma corporation, in said Oklahoma County, Oklahoma, and said Delaware corporation is therefore the successor to the said Oklahoma corporation of the same name, and as such successor has only such rights as said Oklahoma corporation had, and can claim no greater or further rights than said Oklahoma corporation has or had.

That Wilson & Company, Inc. of Oklahoma, the Oklahoma corporation, has changed its name to Oklahoma Packing Company, but is the same corporation and hereinafter may be referred to by either name.

### III

Complainants allege that this is a suit in equity arising under and involving the construction and application of the Constitution and laws of the United States and that the

amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

[fol 4]

#### IV

Complainants allege that under and by virtue of the laws of the State of Oklahoma, complainant, Oklahoma Gas and Electric Company, and complainant, Oklahoma Natural Gas Company, are public utilities and that under and by virtue of the laws of the State of Oklahoma the Corporation Commission of the State of Oklahoma is vested with the power and authority and is charged with the duty of regulating and controlling them as such public utilities in all matters relating to the performance of their public duties and the charges therefor, with power to fix rates, rules, charges and regulations to be observed by them and by all other public utilities of the same kind or character in the State of Oklahoma, and said Corporation Commission -s vested with the power and authority to enforce its orders against them, and each of them, by imposing fines against them for the violation of any of its said orders.

Complainants allege that on and prior to November 13, 1925, the Oklahoma Gas and Electric Company was the owner of a gas distribution system in the City of Oklahoma City and the vicinity thereof and was engaged in the business of selling natural gas for use as heat and fuel to domestic and industrial consumers, both within and without the city limits of Oklahoma City, which said gas was delivered by the said Oklahoma Gas and Electric company, through its distribution system to its said consumers at or on the premises of said consumers at rates prescribed by the Corporation Commission of the State of Oklahoma. The said complainant, Oklahoma Gas and Electric Company, purchasing said gas from the Oklahoma Natural Gas Company at city gates or measuring stations outside of the city limits of said Oklahoma City, and paid the Oklahoma Natural Gas Company for said gas the rate or price fixed by the Corporation Commission of the State of Oklahoma. The gas so purchased from the Oklahoma Natural Gas Company was either produced or purchased by the Oklahoma Natural Gas Company and transmitted through its lines within the State of Oklahoma to the vicinity of Oklahoma City where it was delivered to the Oklahoma Gas and Electric Company through meters at said city gates or measuring stations.

The manufacturing plant of the defendants, Wilson & Company, Inc., the Oklahoma corporation and the Delaware corporation, at all times hereinafter mentioned, was situated in Oklahoma County, without the corporate limits of [fol. 5] said city, but immediately adjacent thereto and within the city gates or measuring stations and on the distribution lines of the Oklahoma Gas and Electric Company. On the said 13th day of November, 1925, and for a long time prior thereto, Wilson & Company, Inc., the Oklahoma corporation, purchased gas from the Oklahoma Gas and Electric Company at a rate of 68¢ for the first 100,000 cubic feet and 20¢ per thousand cubic feet for all in excess thereof where the consumption amounted to 15,000,000 cubic feet or more per month, which was the rate fixed by the Corporation Commission and charged all other consumers or purchasers of gas similarly situated.

Complainants further say that on the said 13th day of November, 1925, the defendant, Wilson & Company, Inc., the Oklahoma Corporation, filed with the Corporation Commission of the State of Oklahoma its petition against the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company praying that said Commission

"make such order with reference to the price of gas to be charged this plaintiff, the connections and meters to be installed, the supply lines to be laid, and the cost thereof and the furnishing of gas direct by the Oklahoma Natural Gas Company to the plaintiff, and for the assessment of such penalties as the facts may seem to warrant in the judgment of the Commission and for such other and further orders as the Commission may deem necessary and just in the premises."

A copy of which said petition is hereto attached and marked Exhibit "A" and made a part hereof.

In due time the cause came on for hearing before the Corporation Commission of the State of Oklahoma, and at the conclusion thereof the case was taken under advisement by said Corporation Commission and thereafter on the 13th day of April, 1926, the Corporation Commission made its Findings of Fact, Opinion and Order requiring the Oklahoma Natural Gas Company to supply Wilson & Company, Inc., the Oklahoma corporation, with natural gas for its use as fuel at its packing plant at the rate of 35¢ per thousand for the first 100,000 cubic feet and 15¢ per thousand for each

additional thousand cubic feet thereafter, provided that the rate should not apply to consumption of less than 15,000,000 cubic feet per month, said order being conditioned on Wilson & Company, Inc., the Oklahoma corporation, either [fol. 6] taking over and purchasing the service line owned and operated by the Oklahoma Gas and Electric Company or the laying and installing of its own service line with all measuring devices and facilities which may be necessary to be installed in rendering said service without expense to the Oklahoma Natural Gas Company. A copy of said Findings, Opinion and Order is hereto attached, marked Exhibit "B" and made a part hereof.

### V

Complainants further say that within the time prescribed by law complainants, Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, took their separate appeals from said order of the Corporation Commission to the Supreme Court of the State of Oklahoma, where said cause was heard by the said court upon the record certified to it by the Corporation Commission; that the said Corporation Commission of Oklahoma, after the entering of its said order and after the filing of notice of appeal by complainants, entered its separate supersedeas orders suspending the operation of said order pending the determination of the appeal and conditioned upon the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company, each respectively, executing supersedeas bonds, and that the said Oklahoma Gas and Electric Company executed supersedeas bonds in said cause aggregating the sum of \$50,000.00; that after the taking of said appeal to the Supreme Court of Oklahoma, and on, to-wit, the 22nd day of September, 1927, the Supreme Court of Oklahoma entered its order substituting as parties appellant, W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp, the directors of the Oklahoma Natural Gas Company, a dissolved corporation, and Oklahoma Natural Gas Corporation, in lieu of Oklahoma Natural Gas Company; copy of which said order is hereto attached, marked Exhibit "C" and made a part hereof. That thereafter on the 29th day of April, 1930, the said Supreme Court of Oklahoma rendered its written opinion and decision affirming the order of the Corporation Commission. Petitions for rehearing were duly filed in said



Supreme Court, which were denied on the 27th day of May, 1930.

## VI

Complainants further say that the order of the Corporation Commission requiring complainant, Oklahoma Natural [fol. 7] Gas Company, to furnish gas directly to Wilson & Company, Inc., the Oklahoma corporation, was and is legislative, and, likewise, the order and decision of the Supreme Court of Oklahoma affirming the order of the Corporation Commission is administrative and legislative and therefore under the Constitution and laws of the United States these complainants have the right to sue in this court and have the decision of this court upon both the law and the facts affecting the validity of said order of the Corporation Commission as affirmed by the Supreme Court of Oklahoma.

## VII

Complainants further say that the order of the Corporation Commission aforesaid is null and void in that it requires complainant, Oklahoma Natural Gas Company, against its will and over its objection to supply natural gas as a fuel directly to Wilson & Company, Inc., the Oklahoma corporation, when said complainant has never undertaken or professed to furnish gas to it, or to other industrial or other gas consumers similarly situated to said Wilson & Company, Inc., the Oklahoma corporation, and said order therefore constitutes an appropriation of private property for public use without just compensation and deprives the complainants of their property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States; that said order is further null and void as to the complainant, Oklahoma Gas and Electric Company, for the reason that same purported under the heavy fines and penalties which may be visited upon said Oklahoma Natural Gas Company to require said Oklahoma Natural Gas Company to furnish such gas to said Wilson & Company, Inc., an Oklahoma corporation, in the place and stead of the same being furnished by said Oklahoma Gas and Electric Company; that the furnishing of such gas by Oklahoma Gas and Electric Company to said Wilson & Company, Inc., was profitable and remunerative to said Oklahoma Gas and Electric Company, and if said order of the Corporation Commission had been carried out



from the time of the making thereof said Oklahoma Gas and Electric Company would have been deprived of so furnishing and continuing to furnish such gas to said Wilson & Company, Inc., subsequent to the making of said order, and would thereby, by reason of said void and invalid order, have been deprived of its property, property rights and remunerative business without due process of law, contrary [fol. 8] to and in violation of the Fourteenth Amendment to the Constitution of the United States.

That also prior to and at the time of the making of, said order there was an oral contract existing between Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company made four or five years prior thereto and extending so long as said Oklahoma Gas and Electric Company should operate its distribution system and purchase gas from said Oklahoma Natural Gas Company, providing that as to consumers of gas within the city gates or measuring stations so situated as said Wilson & Company, Inc., with reference to Oklahoma City, said city gates and the respective properties of Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, that such consumers would be supplied and furnished gas by the Oklahoma Gas and Electric Company and would not be furnished and supplied gas by the Oklahoma Natural Gas Company; that therefore said purported order of the Corporation Commission is further illegal, invalid and void as impairing, or attempting to impair, the rights and obligations of and under said contract between said Oklahoma Gas and Electric Company and said Oklahoma Natural Gas Company, and the contract and contractual relations existing between the Oklahoma Gas and Electric Company and the said Wilson & Company, Inc., whereby gas was so being sold and furnished to said Wilson & Company, Inc., by said Oklahoma Gas and Electric Company, all contrary to and in violation of the provisions of Section 10, Article I of the Constitution of the United States.

### VIII

Complainants further allege that heretofore and, to-wit, on or about the 3rd day of December, 1931, said Wilson & Company, Inc. of Oklahoma, the Delaware corporation, commenced an action in the District Court of Oklahoma County, Oklahoma, against the complainant, Oklahoma Gas and Electric Company, and the Fidelity & Casualty Company of New York, a corporation, wherein plaintiff in that action

seeks to enforce said order No. 3388 of the Corporation Commission of Oklahoma, and to collect a large sum of money from complainant, Oklahoma Gas and Electric Company, and the Fidelity & Casualty Company of New York as surety of said Oklahoma Gas and Electric Company; copy of said petition being hereto attached and marked Exhibit "D" as a part hereof; that the purported cause of [fol. 9] action attempted to be set forth in said action in said state court arises out of and is based upon the alleged validity of said order of the Corporation Commission, and which said Wilson & Company, Inc., the Delaware corporation, by said action is attempting to enforce against complainant, Oklahoma Gas and Electric Company, and its surety as aforesaid.

That said Wilson & Company, Inc., of Oklahoma, the Delaware Corporation, plaintiff in said cause so filed in the District Court of Oklahoma County, is but the successor or assignee and stands in the shoes of said Wilson & Company, Inc., of Oklahoma, the Oklahoma corporation, and as such has only such rights as said Wilson & Company, Inc., the Oklahoma corporation, had and can claim no greater or further rights than said Oklahoma corporation has or had.

That for the reasons hereinbefore set forth said order is invalid and unenforceable, and because thereof said Wilson & Company, Inc., the Delaware corporation, as well as the Oklahoma corporation of the same name, does not have, and could not have, any possible cause of action against said Oklahoma Gas and Electric Company and Fidelity & Casualty Company of New York; that the commencement and prosecution of said action in said state court is an attempt on the part of the said Wilson & Company, Inc., the Delaware corporation, to enforce and make effective the said illegal and void order of the Corporation Commission of the State of Oklahoma and to obtain the same benefits and enjoyment therefrom and thereunder as if said order were valid and legal; that the commencement and prosecution of said action in said state court harasses and annoys complainants and was commenced, and is being prosecuted, for the purpose of harassing and annoying complainants and is an attempt on the part of said Wilson & Company, Inc., to obtain fruits and benefits under such illegal, invalid and void order of the same character, to the same extent, and of the same force and effect as if said order were in fact valid and legal.

That relief cannot be given to complainants herein in said action in said state court, for the reason that Wilson & Company, Inc., the Delaware corporation, is the only plaintiff therein and the Oklahoma Gas and Electric Company and said Fidelity & Casualty Company of New York are the only defendants therein, and there are no other parties thereto, and complete relief cannot be given so as to restrain and enjoin said Corporation Commission and the [fol. 10] Attorney General from attempting to enforce same and to subject the complainants herein, particularly complainants Oklahoma Natural Gas Company, the directors of said company named above, and the Oklahoma Natural Gas Corporation to the heavy fines and penalties for violation thereof; that complete relief can be given herein and said order of the Corporation Commission be declared invalid, void and unenforceable, and that the defendants herein be enjoined and restrained from attempting to enforce the same in any manner.

### IX

Complainants further allege that unless restrained and enjoined, the said Corporation Commission will enforce said order against them, and that said Wilson & Company, Inc., the Delaware corporation, will proceed to vexatiously annoy and embarrass complainants, and that the enforcement of said order by said Corporation Commission, or the attempted enforcement thereof by said Wilson & Company, Inc., the Delaware corporation, will result in irreparable loss and damage to the complainants and the taking of their property without full compensation and without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

Complainants further allege that a disobedience of said order by complainants will subject them to severe fines and penalties, and therefore adequate relief at law is not available to them, and that by reason and virtue of all the facts aforesaid and the penalty statutes of the State of Oklahoma and the right of the Corporation Commission to assess fines and penalties under the laws of the State of Oklahoma for the violation of said order, these complainants will be deprived of their property without due process of law, and will be denied the equal protection of the laws.

Wherefore, complainants pray that the defendants, the Corporation Commission of the State of Oklahoma, Paul Walker, Chairman, C. C. Childers and E. R. Hughes, consti-

tuting said Corporation Commission of the State of Oklahoma, J. Berry King, Attorney General of the State of Oklahoma, Oklahoma Packing Company, formerly Wilson & Company, Inc. of Oklahoma, an Oklahoma corporation, Wilson & Company, Inc. of Oklahoma, a Delaware corporation, their assistants, agents, attorneys and employees, and all persons acting through or under them, be restrained and [fol. 11] enjoined from enforcing or taking any steps to enforce the said order, and that said order be adjudged and decreed to be invalid, void and unenforceable.

Complainants further pray that this court set this cause for hearing on application for interlocutory injunction, and, in accordance with Title 28, Section 380 of the Judicial Code, convene a three Judge Court to hear and determine the application for interlocutory injunction, and that on said hearing the court issue its injunction preliminary to final hearing, and perpetual thereafter in order that said complainants may not suffer irreparable injury and damage as alleged herein, and that pending a hearing of the application for interlocutory injunction this court issue its temporary restraining order to the same effect.

That on said final hearing said preliminary injunction be made perpetual as aforesaid, and that said Order of the Corporation Commission be declared invalid, void and unenforceable, and that complainants may have such other, further and general relief as may be just, equitable, necessary or proper in the premises.

And your complainants will ever pray.

Oklahoma Gas and Electric Company, a corporation;  
Oklahoma Natural Gas Company, a corporation,  
W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts,  
Leonard C. Ritts, R. W. Hannan, A. W. Leonard  
and R. C. Sharp, Directors of the Oklahoma Natural  
Gas Company, a dissolved corporation, Oklahoma  
Natural Gas Corporation, Complainants, by Allen,  
Underwood & Canterbury, Rainey, Flynn, Green &  
Anderson, Ames, Cochran & Ames, Their Attorneys.

[fol. 12] *Duly sworn to by W. R. Emerson. Jurat omitted in printing.*



## EXHIBIT "A" TO COMPLAINT

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

Cause No. 7052

WILSON AND COMPANY, INCORPORATED, OF OKLAHOMA, A CORPORATION, Plaintiff,

vs.

THE OKLAHOMA NATURAL GAS COMPANY, A CORPORATION, AND  
OKLAHOMA GAS AND ELECTRIC COMPANY, A CORPORATION,  
Defendants

(Filed Nov. 15, 1925)

## Petition and Complaint

Plaintiff for its petition and complaint, against the defendants, alleges and states:

## I

That the plaintiff is now and was at the times hereinafter set forth a corporation duly incorporated under the laws of the State of Oklahoma, with its principal place of business at Oklahoma City, in the county and State of Oklahoma, and that it is now and was then engaged in operating a packing plant for the production, sale and manufacture of meats, meat products, and such other incident and allied products as are usually manufactured and sold by the larger packing plants in the United States.

## II

That the defendant, the Oklahoma Natural Gas Company is now and was at the dates herein complained of, a corporation, duly incorporated under the laws of the State of Oklahoma, with its principal place of business in the City of Tulsa, Oklahoma; and that it is now and was at all of such times engaged in the production, purchase, sale and distribution for profit of natural gas in and throughout a large part of the State of Oklahoma, and that as incident to such business, it installed, ~~laged~~, maintained and operated gas lines for the transportation of natural gas from the principal gas fields of the State of Oklahoma, to and through various cities and counties of said state, including Oklahoma City and Oklahoma County.



## III

That the Oklahoma Gas and Electricity Company is and was at the times hereinafter referred to, a corporation, duly incorporated under the laws of the State of Oklahoma, with its principal place of business at Oklahoma City, Oklahoma, and engaged in the purchase, sale and distribution for profit of natural gas.

## IV

That the manufacturing plant of the plaintiff as above described is situate in Oklahoma County, Southwest of Oklahoma City, and is entirely without the corporate limits of said city. The exact location of plaintiff's plant being at a point a little North of East of the intersection of May Avenue and Ash Street, The said May avenue being a North and South highway, and the said Ash Street, being an East and West highway. The exact location of said plant being about 150 yards north of Ash Street and about 350 yards east of May Avenue.

That the defendant, the Oklahoma Natural Gas Company, owns and operates its main transmission line for natural gas leading from the Cement, the Duncan, the Chickasha and other gas field- lying Southwest of Oklahoma City, upon and along May Avenue to Oklahoma City, and also a branch line from said main line from the point of intersection of Ash Street and May Avenue East along Ash Street, to a point at and beyond the plaintiff's plant. Plaintiff is informed and believes that the main line on May Avenue is something like twelve inches in diameter and that the branch line along Ash Street is something like eight or ten inches in diameter. There is leading from a point on Ash Street almost due South of the plaintiff's boiler room, a smaller lead or service; line of about 150 yards in length.

## V

Plaintiff alleges upon information and belief that the defendant, Oklahoma Natural Gas Company owns, operates and maintains the main line leading from the gas fields afore- [fol. 14] said North on May Avenue to Oklahoma City, and the branch line leading off from May Avenue and East on Ash Street and also the service or lead line from the Ash Street line into the boiler room of the plaintiff.

Plaintiff alleges that it is now and has been for some years past supplied with fuel gas from the lines and mains of the

defendant Oklahoma Natural Gas Company as hereinbefore described and for said service the plaintiff has been paying and has been compelled to pay the sum of about 20 cents per thousand cubic feet of gas, but that the billing of said gas to this plaintiff has been done either by or at the instance of the Oklahoma Gas and Electric Company and the payments for all of such gas have been made by the plaintiff to the Oklahoma Gas and Electric Company.

Plaintiff alleges that the Oklahoma Natural Gas Company and the Oklahoma Gas and Electric Company seem to have some sort of arrangement among themselves that the bills for such gas shall be made out by and payments for said gas made to the Oklahoma Gas and Electric Company but the nature and terms and conditions of this arrangement or agreement between said defendants is unknown to this plaintiff. But the plaintiff avers in this connection that the Oklahoma Gas and Electric Company performs no real or substantial service to or for this plaintiff. That there is no waste of gas between the mains of the Oklahoma Natural Gas Company at the point at which this plaintiff takes over its supply of fuel. That there is no cost of distribution, for there is no distribution.

The plaintiff further alleges that if any point is made between defendants or either of them with reference to either the ownership or maintenance of repairs resulting from or incidental to the short supply line leading directly into plaintiff's boiler room, that this plaintiff avers that it is now ready, willing and able to install at its own proper cost and expense a new line leading from plaintiff's boiler room to the lines of supply on Ash Street or if this court deem it necessary and proper that it will install at its own expense a new line from the said boiler room direct to May Avenue over the property of this plaintiff or over property with reference to which it has secured the right to lay said line, and that it will make such other expenditures with reference [fo]. 15] to measuring said fuel as to this court may seem just and proper in the premises.

Plaintiff alleges further that the price which it is paying and is compelled to pay as above set forth for said fuel gas is exorbitant and unreasonable. It shows to the court that conditions have radically changed since the order providing for this rate went into effect. That large supplies of gas have been discovered and are available in various parts of this State and especially within the fields lying immediately

Southwest of Oklahoma there have been discovered perhaps the largest gas wells, gas fields and gas producing territories ever found in the State of Oklahoma. They are easily accessible to Oklahoma City and can be driven through the pipes and mains of the Oklahoma Natural Gas Company, already described herein, without any considerable extra cost and this plaintiff alleges that it is informed and believes that the Oklahoma Natural Gas Company either has control of, or contracts for the purchase of a large part of the gas from these said new territories last described.

That the plaintiff and other industrial users of gas use only the surplus and are always subject to be cut off in the event of extremely cold weather or when and if there should be a scarcity of gas to the intent and purpose that the domestic users of said fuel shall take precedence.

Plaintiff alleges that it is informed and believes that the Oklahoma Natural Gas Company is now and has been extending to industrial users of gas outside the limits of Oklahoma City, prices and rates upon natural gas that are much less than those charged to this plaintiff and that the same have been highly discriminatory as against this plaintiff.

Plaintiff in consideration of the premises prays that the said defendants be cited and notified to answer the charges set out in this petition and complaint and that after due hearing that the Commission make such order with reference to the price of gas to be charged this plaintiff, the connections and meters to be installed, the supply lines to be layed, and the cost thereof and the furnishing of gas direct by the Oklahoma Natural Gas Company to the plaintiff, and for the assessment of such penalties as the facts may seem to warrant in the judgment of the Commission and for such other and further orders as the Commission may deem necessary and just in the premises.

[fol. 16] The plaintiff here and now reserves to itself the right to proceed against the defendant or either of them in another proceeding for the refunding of such over-charges and over payments as have heretofore been made by plaintiff to defendants or either of them.

Wilson & Company, Inc., of Oklahoma, by C. D. Bennett, Attorney for Complainant.

*Duly sworn to by W. R. Grove. Jurat omitted in printing.*

## EXHIBIT "B" TO COMPLAINT

BEFORE THE CORPORATION COMMISSION OF THE STATE OF  
OKLAHOMA

Order No. 3388

Cause No. 7052

WILSON &amp; COMPANY, INC., OF OKLAHOMA, Plaintiff,

vs.

OKLAHOMA NATURAL GAS COMPANY, a Corporation, and OKLAHOMA GAS &amp; ELECTRIC COMPANY, a Corporation, Defendants

## Findings of Fact, Opinion and Order

On November 13th, 1925, Wilson & Co. Inc. of Oklahoma, a corporation organized and existing under the laws of the State of Oklahoma with its principal place of business just outside of the city limits of Oklahoma City, Oklahoma, and southwest from the city of Oklahoma City, filed its petition and complaint in the above entitled cause, against the Oklahoma Natural Gas Company, a corporation, and the Oklahoma Gas & Electric Company, a corporation. It is alleged in said petition that applicant Wilson & Co., Inc. of Oklahoma, [fol. 17] is now and has been for several years past engaged in the operation of a packing plant for the production, sale and manufacture of meat and meat products and such other incidental and allied products as are usually manufactured and sold by packing plants generally; that its plant is situated entirely without the corporate limits of Oklahoma City, is a point slightly north of east of the intersection of May Ave. and Ash Street, May Ave. being a north and south highway and Ash St., being an east and west highway, applicant's plant being located about 150 yards north of Ash St. and about 350 yards east of May Ave. and within an angle formed by the intersection of said streets or highways.

It is alleged that the Oklahoma Natural Gas Company is a corporation; that its principal place of business is at Tulsa, Oklahoma, and is engaged in the production, purchase, sale and distribution of natural gas in and throughout a large part of the State of Oklahoma; that as incident



to such business it has installed, maintained and operated gas lines for the transmission of natural gas from the principal gas fields of the State of Oklahoma, to and through various cities and counties of the State of Oklahoma, including Oklahoma City; that the Oklahoma Gas & Electric Company is a corporation with its principal place of business at Oklahoma City, Oklahoma, and is engaged in the purchase, sale and distribution of natural gas for profit; that the Oklahoma Natural Gas Company owns and operates its main transmission line for natural gas leading from the Cement, Duncan and Chickasha gas fields, southwest of Oklahoma City, upon and along May Ave. and that it also has a branch line leading from said main line at the point of intersection at Ash St. and May Ave. east along Ash St. to a point at and beyond applicant's plant; that the main transmission line along May Ave. is about 12 inches in diameter and that the branch line along Ash St. is about 8 or 10 inches in diameter, and that leading therefrom, at a point almost due south of applicant's boiler room, there is a small service line about 150 yards in length, leading to applicant's boiler room, from which it takes its gas, and that the Oklahoma Natural Gas Company operates and maintains both of these gas lines, the one running north and south along May Ave. and one running east and west along Ash St. from the point of intersection to the point where the service line leads away from the Ash St. line to applicant's boiler room.

[fol. 18] It is alleged that applicant has been compelled and is now compelled to pay the sum of 20 cents per thousand cubic feet for natural gas delivered to its boiler room by the Oklahoma Gas & Electric Company, from and through the lines located and described above; that through some sort of arrangement between defendants, the terms of which are unknown to applicant, the bills for such fuel have been made out by the Oklahoma Gas & Electric Company and that payments have been made to said Oklahoma Gas & Electric Company, but applicant alleges that the Oklahoma Gas & Electric Company has not performed any substantial service in connection with the delivery of said gas to applicant; that there is no waste between the mains of the Oklahoma Natural Gas Company and the boiler room, and that there is no cost of distribution for the reason that there is actually no distribution.

Applicant then alleges that if necessary, it stands ready



and willing to install at its own proper cost and expense, a gas line leading from applicant's boiler room to the line of supply on Ash St. or that if necessary it will install at its own expense a new line from the boiler room direct to May Ave. and that it will make such other expenditures for measuring devices, etc. as may seem just and proper in the premises in order to secure its supply of gas direct from the Oklahoma Natural Gas Company's lines.

It is then alleged that the price which applicant is paying for its gas under the arrangement described, is exorbitant and unreasonable and that conditions have so changed that the rate is unreasonable on account of the large supplies of gas which have been discovered and which are now available in the various parts of the State of Oklahoma, and particularly within the fields from which the Oklahoma Natural Gas Company secures its supply; that applicant only uses the surplus gas available over and above that quantity which is required for domestic consumption in the towns and cities served by defendants, and is subject to be cut off from its supply in event of extremely cold weather when all the gas is required or needed for domestic uses.

It is alleged that the Oklahoma Natural Gas Company is now and has been extending to patrons outside of Oklahoma City, prices and rates for natural gas supplied by it, which are much less than those which the applicant is compelled to pay and that by reason thereof such rates and charges which [fol. 19] applicant is required to pay for the service rendered, is highly unfair and discriminatory.

The prayer of applicant is that the Corporation Commission investigate and inquire into the matters and things set forth in said petition and make such order with reference to the price which should be reasonably charged applicant and with respect to the connections, meters and other appliances which may be required to be installed, and that the Oklahoma Natural Gas Company be ordered to supply it under such terms and conditions as may seem necessary and just in the premises.

The matter was set down for hearing before the Commission for the 27th day of November, 1925, but was continued until the 10th day of December at which time it was partially heard, and continued until the 18th day of December and was concluded on the 19th day of that month.

Wilson & Co., Inc. of Oklahoma, appeared through W. R. Grove and W. R. Garside, officers of said corporation, and

by its attorney of record, C. D. Bennett. The Oklahoma Natural Gas Company appeared by its Vice-President R. C. Sharp, and by its attorneys Ames, Lowe & Cochran, and the Oklahoma Gas & Electric Company appeared by its Vice-President J. F. Owens and by its attorneys Rainey & Flynn.

The testimony of the various witnesses is devoted principally to the location of the lines of gas pipe lines in question on May Ave. and Ash St., the location of the city gate at which point the Oklahoma Natural delivers its supply of gas from its pipe line to the distributing system in Oklahoma City, and with respect to the relationship existing between the Oklahoma Natural Gas Company and the Oklahoma Gas & Electric Company in connection with the service to those patrons living just outside of the city limits of Oklahoma City but within what is known as the city gate, or the point at which the gas is measured to the Oklahoma Gas & Electric Company by the Oklahoma Natural Gas Company.

On or about June 25, 1921, this Commission promulgated Order No. 1886 in Cause No. 4023, whereby the contractual relationship heretofore existing between these two gas companies was dissolved, and a uniform gate rate for gas supplied to the various cities and towns served by the Oklahoma Natural Gas Company was established; the rate [fol. 20] to be applicable to measurements of gas delivered at a point which was called in said order, the city gate. The order provided that distributing companies taking gas from the Oklahoma Natural Gas Company including both the independent companies and those owned by the Oklahoma Natural Gas Company itself, shall receive and accept gas from the Oklahoma Natural Gas Company at the borders or boundaries of each town and city and shall pay for the full amount of gas measured into the distributing system at the borders or boundaries of each town and city.

At the time of the promulgation of said order, it appears from the evidence that the Oklahoma Gas & Electric Company was serving a number of consumers of natural gas outside of the city limits of Oklahoma City, and it is disclosed from the evidence that its contract with the Oklahoma Natural Gas Company provided that it should have the right to serve within five miles of the city limits. It also appears, however, that the Oklahoma Natural Gas Company owned and operated some gas property located

within the city limits of the city of Oklahoma City. Shortly after the promulgation of the order establishing the gate rate, the two gas companies entered into an agreement by the terms of which the Oklahoma Natural Gas Company took over and agreed to serve patrons living outside the city limits and theretofore served by the Oklahoma Gas & Electric Company, and it is not disputed in the record that the Oklahoma Natural did actually take over other property and patrons so situated. However, in this arrangement, applicant Wilson & Co. Inc. of Oklahoma, was not taken over by the Oklahoma Natural Gas Company but has at all times, it appears, been served by the Oklahoma Gas & Electric Company, notwithstanding the plant is located at a point near the streets and highways traversed by one of the main lines of the Oklahoma Natural Gas Company, and notwithstanding the property owned by said applicant is outside the city limits of the city of Oklahoma City.

The evidence disclosed that the city gate measuring station at which point the gas transmitted by the Oklahoma Natural's main line is measured to the Oklahoma Gas & Electric Company, is located approximately 1792 feet west of the point at which the service line leading into the boiler room of the Wilson & Co. plant is connected, and that this [fol. 21] city gate is more than 2000 feet west and outside of the city limits of Oklahoma City.

The evidence shows that the Oklahoma Natural Gas Company owns and maintains a 6 inch high pressure gas line leading from the measuring station or gate, as it is called, to the point at which the service line used to supply the packing plant is connected, but that the Oklahoma Gas & Electric Company owns and maintains the service line leading from this main into the boiler room, a distance of something like 450 feet. It is shown that a 6 inch main line leading along Ash St. from the measuring station or gate, was installed originally as a protection against washouts at the river crossing, so as not to interrupt the service in the southwest part of Oklahoma City during flood periods. However, it is shown that since this installation it has been used as a regular supply line for that portion of Oklahoma City.

The testimony with respect to the agreement between the two gas companies at the time of the promulgation of Order No. 1386, the gate rate order, is not explicit. There is a considerable portion of the record devoted to

a discussion of its terms and as to whether or not it was a verbal agreement or in writing. It is disclosed, however, by the record that it was in the mind of the Oklahoma Natural Gas Company at the time and has been since, that it would have the right to render service to any customer outside of Oklahoma City which it might desire to serve, and it appears from the record that the Oklahoma Natural does not desire to disturb the present condition on account of its relationship with the Oklahoma Gas & Electric Company, one of its largest patrons.

It is shown that at the rate being charged for the gas delivered to the boiler room of applicant, the Oklahoma Gas & Electric Company receives approximately \$100.00 per day or \$36,000.00 per year, and it is contended that the property devoted to that service consists only of the 450 feet pipe line leading from the Oklahoma Natural into the boiler room. The packing plant shows that for the months from May to October, 1925, it used gas as follows, to-wit: In May, 55,570,000 cu. ft.; June 58,155,000; July 64,101,000; August 59,830,000; September 61,886,000 cu. ft.; October 59,862,000 cu. ft.

It also is shown that the Oklahoma Natural Gas Company at the present time is rendering service to large industrial [fol. 22] users of gas adjacent to other towns served by it, particularly the city of Tulsa and Sapulpa, at a rate of 35 cents for the first 100,000 cu. ft. and 15 cents per thousand cu. ft. for all in excess thereof, where the consumption amounts to 15 million cu. ft. per month. It is upon this hypothesis that applicant contends that since it is similarly situated to such concerns as are enjoying this favorable rate and consumes more gas per month than is required to be consumed in order to enjoy such a reduced rate, that it should also be served directly from the lines of the Oklahoma Natural Gas Company at a similar rate, and that it should not be compelled to pay the Oklahoma Gas & Electric Company a profit of approximately 5 cents per thousand cu. ft. for the service which the record discloses that company renders in piping the gas directly from the Oklahoma Natural Line into its boiler room, a distance of about 450 feet.

The legal contention is made by the Oklahoma Natural Gas Company that under the law as construed by the courts respecting the obligation of a public utility to serve only where such an obligation has been assumed by the company



either by the securing of a franchise or by the proffer of such service, it is justified in its refusal to render the service desired by the packing plant. What is known as the Chickasha case is referred to and the opinion of the Supreme Court of the State of Oklahoma in that case is relied upon to support that theory. The Commission, however, believes that the situation confronting the gas company with regard to service of this patron, is distinguishable from the situation which existed in the Chickasha case. There is no question under the facts but that the Oklahoma Natural Gas Company has assumed the obligation of supplying for use in Oklahoma City and vicinity, natural gas for use to those desiring same. It is true that this company holds no franchise in Oklahoma City and is not engaged in the general business of distributing natural gas for public consumption direct to the consumers. However, it is admitted that the company is offering its services to industries and plants outside of cities and towns, who desire large quantities of gas in connection with the operation of similar plants to that which is now under consideration.

The packing industry in Oklahoma City is one of the important industries of the State. Oklahoma City and the state at large is interested in having such plants operated [fol. 23] upon the most economical basis which is reasonable and possible for them to be operated upon. It seems, therefore, that as a matter of general policy, the plant should be served upon as favorable terms and conditions as is practicable, reasonable and just to all concerned. In case the Oklahoma Natural Gas Company is required to render the service desired, it will in no wise detract from the revenues received by the company for the supply of gas which it transports to Oklahoma City for general distribution. So therefore from the standpoint of the Oklahoma Natural Gas Company itself, it is true that it will in no wise be injured by undertaking the service. Moreover, under the terms of the agreement, so far as that agreement has been delineated in this record, it would appear that such a requirement would be only carrying into effect the spirit and purpose of the understanding and agreement which was arrived at at the time of the promulgation of the gate rate order.

It is contended as a legal proposition by the packing plant, that under the terms of Sec. 7904 Compiled Oklahoma Statutes 1921, that the Oklahoma Natural would be required to render the service by reason of the fact that its line traverses the property in which the packing plant



holds at least a subservient interest. Upon this question the Commission does not feel that it is required by the facts in this case to rule.

We believe that insofar as the contention with respect to the meaning of the language contained in Order No. 1886 is concerned, as to the location of the city gate as contemplated by said order, it is not necessary for the purpose of this case to attempt to lay down any fast or definite rule. This is true for the reason that the proof shows that the Oklahoma Natural Gas Company is still the owner of the 6 inch main pipe line extending 1792 feet within said city gate and to the point at which the service under consideration is demanded.

From all the considerations contained herein, and from the record, the Commission is of the opinion and finds:

First. That the Oklahoma Natural Gas Company, a public utility, is engaged in the production and transportation of natural gas to various sections of the State of Oklahoma and supplying various towns and cities with such gas for both industrial and domestic consumption.

Second. That it has obligated itself as a public utility to [fol. 24] transport and to serve natural gas to all similarly situated upon the same terms and conditions.

• Third. That said Oklahoma Natural Gas Company is admittedly supplying and furnishing industries of similar size or smaller, with gas at a rate of 35 cents for the first 100,000 cu. ft. and 15 cents for each additional one thousand cubic feet where gas is consumed in quantities of 15 million cubic feet or more, per month.

Fourth. That Wilson & Co., Inc., of Oklahoma, is consuming in excess of 15 million cubic feet per month and comes within the classification of service which the gas company has voluntarily established.

Fifth. That under the terms and purpose of the agreement entered into shortly after the promulgation of Order No. 1886 establishing the gate rate, the Oklahoma Natural Gas Company by that agreement, appears to have obligated itself to render service to those consumers adjacent to Oklahoma City which were therefore served by the Oklahoma Gas & Electric Company.

Sixth. That the Oklahoma Natural Gas Company is the owner at present of the pipe lines leading from the mea-

asuring station or gate station approximately 1792 feet west of the point at which gas may be delivered to the packing plant.

Seventh. That the packing plant owned and operated by Wilson & Co. Inc. of Oklahoma, is situated outside of the city limits of the city of Oklahoma City, and entirely beyond the city border, and that all of the property necessary to be devoted to the rendition of the service petitioned for is located entirely beyond the city limits of Oklahoma City and entirely beyond the city borders of Oklahoma City.

Eighth. That applicant Wilson & Co. Inc. of Oklahoma, was, at the time of the promulgation of Order 1886, establishing the gate rate and at the time of the agreement between the two gas companies wherein the Oklahoma Natural Gas Company agreed to render service to consumers outside of the city limits of Oklahoma City, operating its packing plant at its present location, and had theretofore from time to time been using natural gas as fuel, though not using same at the immediate time of said agreement.

Ninth. That the Oklahoma Natural Gas Company, under [fol. 25] the circumstances, should be required to supply applicant Wilson & Co. Inc. of Oklahoma, with similar quantities of gas to that supplied other institutions located along its pipe line outside of incorporated cities upon the same terms and upon the same conditions, and that they are therefore obligated to serve applicant as petitioned for.

Tenth. That Wilson & Co. Inc. of Oklahoma, should be required either to take over and to purchase the line now used by the Oklahoma Gas & Electric Company and which is serving the boiler room of Wilson & Co. Inc. of Oklahoma, or should be permitted to construct its own service line extending from such boiler room to a connection upon the pipe line of the Oklahoma Natural Gas Company adjacent to the plant.

Eleventh. That such measuring devices as may be necessary to install at the point in order to allow this service to be rendered, should be installed. All of such devices as may be necessary for the purpose of rendering the service to the plant to be installed at the expense of applicant.

It is therefore the order of the Commission, premises considered, that the Oklahoma Natural Gas Company be and it is hereby required to supply Wilson & Co. Inc. of

Oklahoma, at its packing plant located in the angle created by the intersection of Ash St. and May Ave. southwest of the city of Oklahoma City, with natural gas for its use as fuel at said plant, at the rate of 35 cents per thousand for the first 100,000 cu. ft. and 15 cents per thousand for each additional one thousand cubic feet thereafter, provided that this rate shall not apply to consumption of less than 15 million cubic feet per month.

This order is conditioned upon Wilson & Co. Inc. of Oklahoma, either taking over and purchasing the present service line owned and operated by the Oklahoma Gas & Electric Company, or the laying and installing of its own service lines, with all measuring devices and facilities which may be necessary to be installed in rendering said service, without expense to the Oklahoma Natural Gas Company.

It is the further Order of the Commission that said connection be made and gas turned into the service line of said Wilson & Co. Inc. of Oklahoma, within ten days from and after notice to said company of the completion of said service line and of the company's readiness of accept service.

[fol. 26] Done at Oklahoma City this, the 13th day of April, 1926:

Corporation Commission of Oklahoma, Fred Capshaw, Chairman; F. C. Carter, Commissioner.  
(Seal.)

Attest: Fred Riseling, Asst. Sec'y.

### EXHIBIT "C" TO COMPLAINT

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 17859

OKLAHOMA GAS & ELECTRIC COMPANY, a Corporation and  
OKLAHOMA NATURAL GAS COMPANY, a Corporation, Plaintiffs in Error,

vs.

WILSON & COMPANY, et al., Defendants in Error

Order Substituting Parties Appellant

Now on this 22nd day of September, 1927, the interested parties having filed a stipulation for a substitution of parties appellant:

It is ordered that W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp, the directors of the Oklahoma Natural Gas Corporation, be and they are hereby substituted as parties appellant in lieu of Oklahoma Natural Gas Company.

Fred D. Branson, Chief Justice.

Filed in Supreme Court of Oklahoma, Sept. 22, 1927.  
Jessie E. Moore, Clerk.

Endorsed: Filed in District Court on Oct. 13, 1930.

EXHIBIT "D" TO COMPLAINT

IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF  
OKLAHOMA

No. 71898.

WILSON & Co., Inc., OF OKLAHOMA, a Corporation, Plaintiff

v.

OKLAHOMA GAS & ELECTRIC COMPANY, a Corporation, and  
THE FIDELITY & CASUALTY COMPANY OF NEW YORK, a Corporation, Defendants.

Petition

Wilson & Co. Inc. of Oklahoma, a corporation, for its first [fol. 27] cause of action against the defendants and each of them, alleges:

First Cause of Action

That plaintiff, Wilson & Co. Inc. of Oklahoma, is now and was at the date of the assignment hereinafter referred to a corporation duly organized and existing under the laws of the State of Delaware and is now engaged in the meat packing business at Oklahoma City, Oklahoma.

That Wilson & Co. Inc. of Oklahoma, who executed the said assignment, was at and before the times hereinafter set out a corporation duly organized and existing under the laws of the State of Oklahoma, and was engaged in the meat packing business at Oklahoma City, Oklahoma, until on or about the 3rd day of December, 1931, when it assigned,



transferred and conveyed its packing business and plant at Oklahoma City, its assets, tangible and intangible, all rights of action, choses in action and claims, including the ones in suit, to the plaintiff. A specific assignment of the claims herein sued on was made in writing, a full, true, correct and complete copy whereof is attached to this petition, marked Exhibit "A" and made a part hereof.

That defendant, Oklahoma Gas & Electric Company, is now and was at the dates hereinafter mentioned a corporation organized and existing under the laws of the State of Oklahoma and engaged in the transportation and sale of natural gas at Oklahoma City.

That defendant, Fidelity & Casualty Company of New York, is and was at the times hereinafter specified a corporation organized and existing, as plaintiff is informed and believes, under the laws of the State of New York, and engaged in the execution, for a consideration, of surety, super-seedeas, court, judicial and other forms of bonds within the State of Oklahoma.

For convenience Wilson & Co. Inc. of Oklahoma of Delaware will be referred to herein as "plaintiff"; Wilson & Co. Inc. of Oklahoma, the Oklahoma corporation, will be referred to as the "Oklahoma Co."; the Oklahoma Gas & Electric Company as the "O. G. & E. Co."; the Oklahoma Natural Gas Company as the "gas company", and the Fidelity & Casualty Company of New York as the "bonding Company."

[fol. 28] That on or about November 13, 1925, the Oklahoma Co. as plaintiff filed a petition or complaint with the Corporation Commission of the State of Oklahoma against the gas company and O. G. & E. Co. praying for certain relief against said corporations. A copy of said petition and complaint is hereto attached, marked Exhibit "B" and made a part hereof.

On April 13, 1926, after a full hearing the said Corporation Commission duly made and entered its findings of fact, opinion, order and judgment upon the issues in said cause in favor of the Oklahoma Co. A copy of said findings, order and judgment is hereto attached, marked Exhibit "C" and made a part hereof.

That on or about April 22, 1926, O. G. & E. Co. served notice of appeal from said order and judgment and filed its application to have the facts and record certified to the Supreme Court of the State of Oklahoma for review. Copy

of said application is hereto attached, marked Exhibit "D" and made a part hereof.

That on the 22nd day of April, 1926, O. G. & E. Co. prayed a supersedeas of said order and judgment during the pendency of the case on appeal before the Supreme Court of Oklahoma; a copy of said application being attached hereto marked Exhibit "E" and made a part hereof.

That on April 19, 1926, Oklahoma Co. served upon O. G. & E. Co. and the gas company a written notice to the effect that it would take over by purchase the short service line leading into the Oklahoma Co.'s boiler room (referred to in Exhibit "C"), upon such terms and conditions as might be reasonable and just, and that in the event of failure to agree upon such terms that the Oklahoma Co. would parallel said service line with one of its own from its boiler room to the main gas line of the gas company. A full, true, correct and complete copy of said notice is hereto attached, marked Exhibit "F" and made a part hereof.

That on April 22, 1926, O. G. & E. Co. served notice of appeal from said order and judgment of the Corporation Commission and filed an application with said Commission to certify the facts and record to the Supreme Court. A full, true, correct and complete copy of said application is hereto attached, marked Exhibit "G" and made a part hereof.

[fol. 29] That on April 26, 1926, said Corporation Commission allowed the appeal of the O. G. & E. Co. to the Supreme Court of the State of Oklahoma, and made an order staying, suspending and superseding the judgment and order appealed from, provided that O. G. & E. Co. should post with the Commission a good and sufficient bond in the sum of \$25,000.00, conditioned upon repayment to Oklahoma Co. of all sums of money collected for gas supplied said company over and above the amount that the Oklahoma Co. would have paid for the said gas if it had been furnished under said order appealed from and after April 23, 1926, together with interest at the rate of six per cent per annum on all sums so collected pending final determination of said appeal. A full, true, correct and complete copy of said order is hereto attached, marked Exhibit "H" and made a part hereof.

And on the same date, to-wit, April 27, 1926, the Corporation Commission allowed the appeal of the gas company to the Supreme Court of the State of Oklahoma, but found

and adjudged that since O. G. & E. Co. had been permitted to supersede the order appealed from by the execution and filing of a \$25,000.00 bond protecting the Oklahoma Co. in any amount charged and collected for gas pending the appeal in excess of the amount the Oklahoma Co. would have paid for gas if it had been furnished under the order appealed from, and since the gas company was not at that time supplying the Oklahoma Co., that only a nominal bond should be required. A full, true, correct and complete copy of said order is hereto attached, marked Exhibit "I" and made a part hereof.

That thereafter, to-wit, on May 6, 1926, the defendant, O. G. & E. Co., as principal, and the defendant bonding company, as surety, executed and delivered to the said Commission their bond in the sum of \$25,000.00 payable to Oklahoma Co. conditioned that the O. G. & E. Co. should pay the Oklahoma Co. all amounts collected from it by said O. G. & E. Co. for gas furnished in excess of the amount that the Oklahoma Co. would have paid if the said gas had been furnished under said order appealed from, together with six per cent interest on any such amounts from and after April 23, 1926. A full, true, correct and complete copy of said bond is hereto attached, marked Exhibit "J" and made a part hereof.

That on the 29th of April, 1930, the Supreme Court of the State of Oklahoma rendered its written decision affirming [fol. 30] in whole the said order and judgment of the Corporation Commission appealed from and on May 27, 1930, petition for rehearing on said appeal was denied by said Supreme Court and the opinion therein became final. (See O. G. & E. Co. v. Wilson & Co., 146 Okla. 272; 288 Pac. 316.)

In consideration of the premises the foregoing bond and the two succeeding bonds (each of which was approved by the court) herein sued on and the statements of the O. G. & E. Co., hereinafter set out, the Oklahoma Co. purchased from O. G. & E. Co. between February 23, 1926, and February 19, 1928, fuel gas on the dates, in the amounts and for the sums shown in Exhibit "K" hereto attached and made a part hereof. The excess amount actually paid by Oklahoma Co. for such gas over the amount which should and would have been paid if the same had been furnished and paid for under the order appealed from, to-wit, order No. 3388 and affirmed by the Supreme Court as aforesaid, is \$80,621.80; the accrued interest on the various items consti-

tuting said total, computed to April 18, 1931, is \$19,306.25, payment of all of which has been demanded of but has been refused by defendants.

Wherefore, plaintiff prays judgment against O. G. & E. Co. and the Fidelity & Casualty Company of New York for \$25,000.00, the amount of principal of the bond hereinbefore referred to and now sued on, and interest thereon at six per cent from the breach thereof, for all costs and for all proper relief, both equitable and legal.

### Second Cause of Action

For second cause of action plaintiff hereby makes each and all of the allegations of plaintiff's first cause of action a part and parcel of this its second cause of action as fully as if recopied herein, and, in addition, alleges that on or about the 27th day of December, 1926, in consideration of the premises and further purchases of gas, to further secure the Oklahoma Co., said O. G. & E. Co., as principal, and the said bonding company, as surety, executed and filed in the Supreme Court in cause No. 17,859, entitled Oklahoma Gas & Electric Co., et al., plaintiffs in error, v. Wilson & Co. Inc. of Oklahoma, a corporation, et al., defendants in error, being the case first herein referred to on appeal, a bond in the sum of \$15,000.00 setting out in substance that, whereas, Wilson & Co., Inc. of Oklahoma had made application in the cause [fol. 31] for additional bond to further secure said company on account of additional potential liability incurred by reason of the passage of time and furnishing more gas and that the O. G. & E. Co. had agreed to execute such additional security. Said bond is conditioned that the O. G. & E. Co. should pay to Wilson & Co., in the event of the affirmance or dismissal of said appeal such amount as said electric company should collect for gas from Wilson & Co. in excess of the amount that Wilson & Co. should or would have paid if gas had been furnished to them under order No. 3388 appealed from and with interest thereon at six per cent from April 23, 1926. A full, true, correct and complete copy of said bond is hereto attached, marked Exhibit "L" and made a part hereof.

Upon the final decision of the Supreme Court in the cause as hereinbefore referred to and by reason of the payment by the Oklahoma Co. to the said O. G. & E. Co. of the various sums of money for gas as shown by Exhibit "K" attached



to the petition as a part of the first cause of action, and, by reference, made part hereof, the Oklahoma Co. became entitled to collect the said \$15,000.00 bond which was in default as aforesaid and interest thereon from the date of such breach and payment of all of which has been demanded of defendants, but payment has been refused.

Wherefore, plaintiff demands judgment against Oklahoma Gas & Electric Company and the Fidelity & Casualty Company of New York for \$15,000.00, the principal of said bond, together with six per cent interest from the date of the breach thereof, for all costs and for such other legal and equitable relief as may be proper in the premises.

### Third Cause of Action

Plaintiff for its third cause of action makes all the allegations of the first and second causes of action as hereinbefore set out a part of this its third cause of action as fully as if recopied herein and in addition thereto alleges that on July 6, 1927, said O. G. & E. Co., as principal, and the Fidelity & Casualty Company of New York, as surety, in consideration of premises and the purchase of gas made and to be made by the Oklahoma Co., executed, delivered and filed in the last named cause their bond in the sum of \$10,000.00, providing, in substance, that Wilson & Co., Inc. of Oklahoma had requested additional bond to further secure it on account of [fol. 32]. further potential liability incurred by reason of further lapse of time and the furnishing of further fuel gas; that the O. G. & E. Co. had agreed to comply with said request to execute and file further security, and in obedience to such request and agreement the said \$10,000.00 bond was executed and filed and that the same is conditioned that the electric company should pay to Wilson & Co., Inc. of Oklahoma all amounts collected by said electric company in excess of the amount or amounts which Wilson & Co. would and should have paid if the said gas had been furnished under the order of the Corporation Commission No. 3388, appealed from as aforesaid, together with six per cent interest upon any such amount from and after April 23, 1926, in the event of the dismissal or affirmance of said case upon appeal. A full, true, correct and complete copy of said bond is hereto attached, marked Exhibit "M" and made a part hereof.

Plaintiff further avers that by reason of the order of said Corporation Commission No. 3388 and the affirmance of said

order by the Supreme Court as aforesaid and by reason of the purchase of gas and payments made for same by the Oklahoma Co., all as disclosed by Exhibit "K" attached to plaintiff's first cause of action and made a part hereof by reference, the said bond was breached and the conditions thereof became absolute and the same became payable to plaintiff according to its full face together with interest thereon from such breach.

Wherefore plaintiff demands judgment against the defendant, the Oklahoma Gas & Electric Company, a corporation, and Fidelity & Casualty Company of New York, a corporation, for \$10,000, the principal of said bond, together with six per cent interest thereon from the date of breach thereof, for costs and for all other proper relief, legal and equitable.

#### Fourth Cause of Action

For a fourth cause of action plaintiff alleges that it makes each and all of the allegations of the first, second and third causes of action hereinbefore set out a part of this its fourth cause of action as fully as if recopied herein and in addition alleges that under the statutes of Oklahoma appeals from the Corporation Commission are given precedence in hearing and disposition by the Supreme Court, but for reasons unknown to this plaintiff this procedure was not observed in the decision on the appeal in this cause and the case lay for [fol. 33] a long time undisposed of in said court, and the additional bonds, the necessity for which did not appear at the time of appeal, were given to meet such emergency.

Soon after giving the last bond herein sued on, the exact date not being known to plaintiff, the Oklahoma Co. advised the O. G. & E. Co. that the amounts paid for gas supplied the Oklahoma Co. over and above the amounts which should have been paid if the fuel had been furnished under the said order appealed from, were equal to or in excess of the aggregate amount of the supersedeas bonds filed, and that unless additional bonds were filed, the Oklahoma Co. would be compelled to cease purchasing gas from O. G. & E. Co. or would seek from the Supreme Court an order requiring further and additional security. The O. G. & E. Co. at that time requested plaintiff to continue to purchase gas from it and that it would file additional bond but that such bonds were expensive and that the O. G. & E. Co. was financially responsible and able to respond to the Oklahoma Co. for all excess

sums collected over and above those which would and should have been payable if the gas had been supplied under the order appealed from as aforesaid and that if the Oklahoma Co. would continue to purchase gas from it and would save it the expense of additional bonds that the O. G. & E. Co. was abundantly able to respond and would respond to said Oklahoma Co. for all such excesses and further that the O. G. & E. Co. was the real party in interest as defendant and had the only financial interest therein and that while the gas company was nominally a real defendant that the proof showed otherwise and that the Corporation Commission in effect found otherwise. That the bond required of the gas company was a mere nominal bond. The bond required of the O. G. & E. Co. was the only one ordered or which was in contemplation of the Corporation Commission or the parties to be relied upon to protect the Oklahoma Co. That the litigation before the Corporation Commission and thereafter upon appeal was all prosecuted for the sole benefit of the O. G. & E. Co. which was the real party in interest in said litigation and all of this was made known to the Oklahoma Co. by the O. G. & E. Co., not only by the evidence and records in the case, but also by the statements of J. F. Owens, its general manager, and the counsel representing the O. G. & E. Co. at or about the time the bonds aforesaid were given, which statements were to the effect that the O. G. & E. Co. would suffer the only loss if the order of the Corporation [fol. 34] Commission were affirmed and that it was called upon to bear the burden of the appeal on that account, and that it would have to respond to the Oklahoma Co.'s loss irrespective of the bonds, which it was abundantly able to do. Such statements were made to forestall and did forestall the demand for further bonds.

Plaintiff alleges that said O. G. & E. Co. was the only real party in interest as against plaintiff; that the only financial loss arising from the affirmance of the Corporation Commission's order No. 3388 fell upon the said O. G. & E. Co. and the entire loss resulting to the Oklahoma Co. from a suspension of the order of the Corporation Commission aforesaid inured in toto to the benefit of said O. G. & E. Co. and not to the gas company. That while the Corporation Commission order was directed in part or nominally at the gas company, the beneficial party in interest in fact was not the latter company, but was the O. G. & E. Co. and as such having sus-

pended the order the plaintiff, whose plant was equipped for gas as fuel, was in effect compelled to buy fuel from said O. G. & E. Co., the only remaining source of supply of such fuel at Oklahoma City.

The Oklahoma Co., relying upon the fact that O. G. & E. Co. was the real party in interest, the good faith of the O. G. & E. Co. in its interpretation of the relation and duties of the respective parties, as hereinbefore set out to the effect that it was the real party in interest in the litigation and the appeal and therefore liable for and would pay the Oklahoma Co.'s loss irrespective of bond, forebore to require other bonds, but continued to and did purchase gas as shown by Exhibit "K" and paid and the O. G. & E. Co. received therefor \$80,621.80, that is, \$30,621.80 in excess of the aggregate principal of the bonds herein sued on and in excess of the amount that the Oklahoma Co. would have paid for said gas had it been furnished under order 3388.

Plaintiff further says that the O. G. & E. Co. is now estopped by reason of the matters hereinbefore set out from setting up any irregularity either in the bonds or in respect to the fourth cause of action as against this plaintiff which has acted in good faith in reliance upon this record and the good faith, promises and the interpretation of its legal responsibility by said O. G. & E. Co., and has purchased gas [fol. 35] from said company as shown by Exhibit "K" and has paid therefor a rate in excess of the rate which it would have enjoyed if said order had not been suspended and that every dollar of the loss to the Oklahoma Co. and therefore plaintiff's loss, inured to the benefit of the O. G. & E. Co. and was made possible only by a suspension of said order during the appeal which was groundless but which was prosecuted for the benefit of the O. G. & E. Co., since the revenues and receipts of the gas company for gas could not have been affected in any way by the affirmance or disaffirmance of said order No. 3388 but the revenue of the O. G. & E. Co. in the event of disaffirmance of said order would have been increased by the exact amount of the Oklahoma Co.'s loss, but no part of the gain of the O. G. & E. Co. or of the loss of the Oklahoma Co. would affect the receipts of the gas company for gas.

In the litigation before the Commission and on appeal it was the contention of the O. G. & E. Co. that under the gate rate order of the Commission No. 1886 and the agreement made between O. G. & E. Co. and the gas company at the time



said order was made the O. G. & E. Co. had the right and the gas company did not have the right to serve Wilson & Co. The judgment and order of the Commission affirmed on appeal held in effect that the O. G. & E. Co. did not, under said order and agreement aforesaid, have such right, but that the gas company had such right and should furnish gas to Wilson & Co., it being admitted that one of the two companies had the right and also owed the duty to so furnish gas.

Wherefore, premises considered, plaintiff demands judgment on its fourth cause of action against the Oklahoma Gas & Electric Company for the sum of \$30,621.80, together with six per cent interest on the various payments making up this total, as well as the payments making up the total recovered in the first three causes of action, less any interest recovered in said three causes of action and for such other and further relief as to the court may seem just and proper.

\_\_\_\_\_, \_\_\_\_\_, Attorneys for Plaintiff.

[fol. 36] IN UNITED STATES DISTRICT COURT

CHANCERY SUBPOENA—Filed May 25, 1932

UNITED STATES OF AMERICA,

Western District of Oklahoma, ss:

District Court of the United States of America to Oklahoma Packing Company, formerly Wilson & Company, Inc. of Oklahoma, an Oklahoma corporation, Wilson & Company, Inc. of Oklahoma, a Delaware corporation, The Corporation Commission of the State of Oklahoma, Paul Walker, Chairman, C. C. Childers and E. R. Hughes, members of said Commission, J. Berry King, Attorney General of the State of Oklahoma, Greeting:

This is to command you and every of you, that you appear before the Judge of the District Court of the United States of America for the Western District of Oklahoma, at the City of Oklahoma City in said District, to answer the Bill of Complaint of Oklahoma Gas and Electric Company, a corporation, and others, this day filed in the Clerk's office of said Court in said City of Guthrie to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the Western District of Oklahoma to Execute:

Witness, the Hon. Edgar S. Vaught, Judge of the District Court of the United States of America for the Western District of Oklahoma, at the City of Guthrie, in said District, this 20th day of May, in the year of our Lord one thousand nine hundred and thirty-two.

Theodore M. Filson, Clerk, by Grace G. Butler,  
Deputy Clerk. (Seal.)

### Memorandum

The above-named defendants are notified that unless they file their answer or other defense in the Clerk's office of said Court, at the City of Oklahoma City aforesaid, on or before the twentieth day after service of the above writ (excluding the day of service), the Bill of Complaint may be taken pro confesso and a decree entered accordingly.

Theodore M. Filson, Clerk, by Grace G. Butler,  
Deputy Clerk.

[fol. 37] Returnable June 9, A. D. 1932. Theodore M. Filson, Clerk, Grace G. Butler, Deputy Clerk.

[File endorsement omitted.]

### U. S. MARSHAL'S RETURN

UNITED STATES OF AMERICA,

Western District of Oklahoma, ss:

Received the within writ May the 23rd, 1932, and executed the same at Oklahoma City, on May 23rd, 1932, by leaving a true copy of this writ for Oklahoma Pacing Company, formerly Wilson & Company Inc. of Oklahoma, an Oklahoma corporation, with W. W. Martin in person, Secretary of said corporation. The President or other higher officers not found in my district, and by leaving a true copy of this writ for Wilson & Company, Inc. of Oklahoma, a Delaware corporation, with W. W. Martin, service agent for said corporation, and by leaving a true copy of this writ for the Corporation Commission of the State of Oklahoma, with Paul Walker, chairman of said Corporation Commission, in per-

son, and copy of said writ with J. Berry King, Attorney General of the State of Oklahoma, in person.

Richard B. Quinn, U. S. Marshal, by George F. Long,  
Deputy.

IN UNITED STATES DISTRICT COURT

TEMPORARY RESTRAINING ORDER—Filed May 20, 1932

It appearing from the verified bill of complaint filed herein that the defendants are pressing the enforcement of the order of the Corporation Commission of the State of Oklahoma alleged by the complaints to be invalid and void, and from complainants' allegations said complainants will suffer irreparable loss and damage unless this Court grants [fol. 38] a restraining order, pending hearing upon complainants' application for temporary injunction, wherefore,

It is Hereby Ordered adjudged and decreed that respondents, The Corporation Commission of the State of Oklahoma, Paul Walker, C. C. Childers and E. R. Hughes, members of said Commission, J. Berry King, Attorney General of the State of Oklahoma, Oklahoma Packing Company, a corporation, formerly Wilson & Company, Inc. of Oklahoma, an Oklahoma corporation, and Wilson & Company, Inc. of Oklahoma, a Delaware corporation, and each of them, their assistants, agents, attorneys, employees and all persons acting through or under them, be and they are hereby, pending the hearing upon application for temporary injunction, enjoined and restrained from enforcing or taking further steps to enforce, or doing any act toward the enforcement of or to obtain any benefit under said Order No. 3388 of the Corporation Commission of the State of Oklahoma set forth in complainants' bill.

It Is Further Ordered that the application of complainants for temporary injunction be set down for hearing at Oklahoma City, Oklahoma, on the 30th day of May, 1932, at ten o'clock A. M., at which time defendants and each of them are cited to appear and show cause why said temporary injunction should not be granted.

It is Further Ordered that service hereof shall be made by copy of this order, together with copy of bill of complaint herein, being served upon respondents and each of them, and upon the Governor or Acting Governor of the State of Oklahoma and the Attorney General of said state, said service to

be at least five days before the date set for said hearing for said temporary injunction.

This May 20th, 1932.

(Signed) Edgar S. Vaught, District Judge.

IN UNITED STATES DISTRICT COURT

MOTION OF WILSON & CO., INC. OF OKLAHOMA TO DISMISS BILL  
—Filed June 9, 1932

Now comes Wilson & Co., Inc. of Oklahoma, a Delaware [fol. 39] corporation, defendant in the above-entitled cause, appearing specially and solely for the purpose of objecting to being sued in the Western District of Oklahoma, and moves the Court to dismiss the Bill of Complaint in the above-entitled cause in so far as it relates to this defendant, Wilson & Co., Inc. of Oklahoma, for the reason that the defendant, Wilson & Co., Inc. of Oklahoma is not an inhabitant of the Western District of Oklahoma, but is a corporation organized under the laws of the State of Delaware, and an inhabitant of the State of Delaware, and has its principal office in the State of Delaware, and the United States District Court of the District of Delaware is the District Court of the United States which may have jurisdiction of suits arising under the constitution and laws of the United States of America against this defendant, Wilson & Co., Inc. of Oklahoma, a Delaware corporation, and is the proper venue of the same, and not the United States District Court of the Western District of Oklahoma; in which this suit is brought.

In support of said motion Wilson & Co., Inc. of Oklahoma, a Delaware corporation, defendant, shows the Court that it appears from the Bill of Complaint that this defendant, Wilson & Co., Inc. of Oklahoma, is a corporation organized and existing under the laws of the State of Delaware and a citizen of said state; that the sole Federal ground for jurisdiction is that this is a suit in equity arising under, and involving the construction and application of the constitution and laws of the United States.

This defendant, Wilson & Co., Inc. of Oklahoma, is an inhabitant of the State of Delaware and a civil suit cannot



be brought in any other district than that whereof it is an inhabitant.

Wilson & Co., Inc. of Oklahoma, a Delaware Corporation, by W. R. Brown, C. D. Bennett, Solicitors for Defendant, Wilson & Co., Inc. of Oklahoma, a Delaware Corporation, Appearing Specially and Solely for the Above Purpose.

[fol. 40] IN UNITED STATES DISTRICT COURT

ANSWER OF OKLAHOMA PACKING COMPANY, FORMERLY WILSON & CO., INC. OF OKLAHOMA, AN OKLAHOMA CORPORATION, TO THE BILL OF COMPLAINT—Filed June 9, 1932

For answer to the Bill of Complaint this defendant, Oklahoma Packing Company, in the above-entitled cause, says:

1. Answering, this defendant admits the allegations contained in paragraph I of said bill.

2. This defendant admits that Oklahoma Natural Gas Company was a corporation engaged, within the State of Oklahoma, in the business of distributing natural gas as a public utility. This defendant has no knowledge as to whether the said Oklahoma Natural Gas Company had been dissolved as a corporation, or whether W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp are directors of the Oklahoma Natural Gas Company or as to whether they are duly authorized to sue in winding up the affairs of said corporation, as alleged in paragraph II of said bill; and therefore denies that said corporation has been dissolved, and denies that said individuals are the directors of said corporation; and further denies that said individuals are authorized by law to maintain this suit.

3. This defendant has no knowledge as to whether the Oklahoma Natural Gas Corporation is a corporation or a public utility or the successor in interest of the Oklahoma Natural Gas Company, as alleged in paragraph II of said bill; therefore denies that said Oklahoma Natural Gas Corporation is a corporation; denies that it is a public utility; and further denies that it is the successor in interest of the said Oklahoma Natural Gas Company. This defendant further answering says the allegations in said bill touching and

referring to Oklahoma Natural Gas Corporation are immaterial to this cause, and that the Oklahoma Natural Gas Corporation has no interest in this suit and is improperly joined as a plaintiff.

4. This defendant, further answering, admits that the Corporation Commission of Oklahoma is a body created by the Constitution of the State of Oklahoma, and that Paul Walker, C. C. Childers and E. R. Hughes are the qualified and acting members of said Corporation Commission; that J. Berry King is the Attorney General of the State of Oklahoma [fol. 41] and the attorney for the Corporation Commission. This defendant, further answering, says that said Corporation Commission is not an administrative body; that said Corporation Commission's powers, duties, and functions are defined and fixed by the Constitution and laws of the State of Oklahoma; that said Corporation Commission possesses and exercises judicial powers and functions as well as other powers under the constitution and laws of the State of Oklahoma; that the allegations in paragraph II of said bill that said Corporation Commission is "an administrative body created by the constitution of the State of Oklahoma" is a mere conclusion of law, and as such is immaterial and should be disregarded and stricken from said bill.

5. This defendant further answering admits that it is a corporation organized under the laws of the State of Oklahoma, and that prior to March, 1931, it was engaged in operating a meat packing plant in Oklahoma County, outside the City of Oklahoma City.

6. This defendant admits that Wilson & Co., Inc. of Oklahoma, a Delaware corporation, did, in March, 1931, purchase from this defendant the packing plant and business located in Oklahoma County, Oklahoma, and chose in action, and particularly any claim this defendant had against Oklahoma Gas and Electric Company and its surety, Fidelity & Casualty Company of New York, and has since said purchase carried on business at the said packing plant in Oklahoma County, Oklahoma. This defendant admits that its name has been changed to Oklahoma Packing Company.

7. This defendant denies that this is a suit in equity arising under, and involving the construction and application of the constitution and laws of the United States, as alleged in paragraph III of said bill.

8. This defendant admits that the Oklahoma Gas & Electric Company and the Oklahoma Natural Gas Company are public utilities, and that the Corporation Commission of the State of Oklahoma is vested with the power to compel them to perform their public duties, and to enforce its orders by imposing fines against them for the violation of any of their public duties. This defendant further answering says that the allegations contained in paragraph IV of said bill as to the power and duty of the Corporation Commission in [fol. 42] regulating and controlling the Oklahoma Gas & Electric Company and the Oklahoma Natural Gas Company and fixing their charges therefor and rates are immaterial in this case and should be stricken; that said allegations are mere conclusions of law.

9. This defendant, further answering, admits that the Oklahoma Gas & Electric Company was on and prior to November 13, 1925, the owner of a gas distributing system in the City of Oklahoma City; that this defendant has no knowledge as to whether the Oklahoma Gas & Electric Company own any gas distributing system without the limits of the City of Oklahoma City. This defendant has no knowledge as to whether the Oklahoma Gas & Electric Company purchased said gas from Oklahoma Natural Gas Company at the city gates or not, or as to the prices or terms upon which said gas was delivered by the Oklahoma Natural Gas Company, if at all, to the Oklahoma Gas & Electric Company. This defendant has no knowledge as to whether the Oklahoma Natural Gas Company either produced or purchased said gas and transmitted it to the vicinity of Oklahoma City, and there delivered to the Oklahoma Gas & Electric Company through meters at said city gates; and therefore denies that the Oklahoma Gas & Electric Company owned any distributing system without the limits of the City of Oklahoma City; and denies that the Oklahoma Gas & Electric Company purchased gas from the Oklahoma Natural Gas Company; and denies that the Oklahoma Natural Gas Company delivered gas to the Oklahoma Gas & Electric Company.

10. This defendant admits that prior to March, 1931, it owned a manufacturing plant situated in Oklahoma County, without the corporate limits of said Oklahoma City. This defendant denies that said plant was immediately adjacent to the City of Oklahoma City, and denies that its plant was

within the city gates as fixed by the Corporation Commission of Oklahoma for the delivery of gas by the Oklahoma Natural Gas Company to the Oklahoma Gas & Electric Company. This defendant, further answering, says the Oklahoma Natural Gas Company and the Oklahoma Gas & Electric Company has been ordered by the Corporation Commission of the State of Oklahoma to establish city gates and measuring stations at the city limits of the City of Oklahoma City; that they had wholly failed to abide by said order, and, on the contrary, established measuring stations or meters far beyond the city limits. This defendant further denies that its said plant was on the distributing lines of the Oklahoma Gas & Electric Company.

11. This defendant, further answering, says that prior to the 13th day of November, 1925, it purchased gas from the Oklahoma Gas & Electric Company at the rates of 68c per thousand for the first 100,000 cubic feet, and 20c per thousand cubic feet for all in excess thereof, where the consumption amounted to 15,000,000 cubic feet or more per month. This defendant denies that the said rates were fixed by the Corporation Commission or were charged other consumers or purchasers of gas similarly situated. This defendant further answering, says that upon information and belief the said gas was delivered to this defendant under a contract or agreement between the Oklahoma Natural Gas Company and the Oklahoma Gas & Electric Company, the contents of which agreement are not known to this defendant. This defendant, further answering, on information and belief says that the distributing lines within the measuring station used in supplying the gas to this defendant were owned by the Oklahoma Natural Gas Company.

12. This defendant, further answering, admits that it did on or about the 13th day of November, 1925, file its petition with the Corporation Commission of the State of Oklahoma, a copy of which is attached to the petition and marked "Exhibit A", as alleged in paragraph IV of said bill. This defendant, further answering, admits that the Corporation Commission did on or about the 13th day of April, 1926, make its Findings of Fact, Opinion and Order, a true copy of which is attached to said bill and marked "Exhibit B."

13. This defendant admits the allegations in paragraph V of said bill. There is attached hereto, and marked "Ex-



hibits A, B and C", true copies of said supersedeas bonds filed by Oklahoma Gas & Electric Company, and made a part hereof. That said Oklahoma Gas & Electric Company has not refunded, in whole or in part, any of the amounts collected in excess of the rates named in said order #3388.

14. This defendant denies that the order of the Corporation Commission requiring the Oklahoma Natural Gas Company to furnish gas to this defendant was legislative; and likewise denies that the decision of the Supreme Court of [fol. 44] Oklahoma affirming the order is administrative and legislative; and denies that these complainants have any right to sue in this court and have the decision of this Court upon the law and facts affecting the validity of said order as affirmed by the Supreme Court of Oklahoma, as alleged in paragraph VI of said bill. This defendant, further answering, says that the allegations contained in paragraph VI of said bill are mere conclusions of law and are immaterial to this cause and should be stricken from the said bill.

15. This defendant denies that the order of the Corporation Commission is null and void in that it requires complainant Oklahoma Natural Gas Company, against its will and over its objection, to supply natural gas as a fuel directly to this defendant, when it has never undertaken or professed to furnish gas to this defendant or to industries or other gas consumers similarly situated to this defendant. This defendant further denies that said order constitutes the appropriation of private property for public use without just compensation, and denies that it deprives the complainants, or either of them, of their property without due process of law, contrary to, and in violation of the Fourteenth Amendment to the Constitution of the United States, as alleged in paragraph VII of said bill. This defendant, further answering, says that the Oklahoma Natural Gas Company did, as a public utility, furnish gas to this defendant's plant and to other industries and to other gas consumers similarly situated to the plant of this defendant long prior to the entering of said order.

16. This defendant says that the said order did not forbid or prevent Oklahoma Gas & Electric Company furnishing gas to this defendant; that said order required Oklahoma Natural Gas Company to furnish gas to this defendant with-

out discrimination, upon the same terms as it furnished gas to others. There was nothing in the order preventing Oklahoma Gas & Electric Company furnishing gas to this defendant upon the same terms and conditions. The Corporation Commission, by its order, permitted Oklahoma Gas & Electric Company to supersede the order upon the condition that it refund to this defendant the amounts collected in excess of the amount that this defendant would have paid if gas had been furnished by Oklahoma Natural Gas Company under the said order. The Oklahoma Gas & Electric Company did furnish gas to this defendant under a bond and contract to refund to this defendant, in the [fol. 45] event said order was affirmed by the Supreme Court of Oklahoma, the amount collected in excess of the amount this defendant would have paid if gas had been furnished by Oklahoma Natural Gas Company under said order. Oklahoma Gas & Electric Company is not deprived of any property right by said order. The furnishing of gas to this defendant was only profitable and remunerative to Oklahoma Gas & Electric Company because of an illegal conspiracy, in restraint of trade or commerce, entered into by, and between Oklahoma Gas & Electric Company and Oklahoma Natural Gas Company.

17. This defendant says that it is without knowledge or information, except as contained in paragraph VII of said bill, as to the alleged oral contract existing between Oklahoma Gas & Electric Company and Oklahoma Natural Gas Company whereby this defendant and other consumers similarly situated would not be furnished gas by Oklahoma Natural Gas Company, and therefore admits the same. This defendant says that said verbal contract was a conspiracy in restraint of trade and against public policy and illegal under section 11017 of Compiled Oklahoma Statutes (1921); that said Oklahoma Gas & Electric Company had and obtained no rights under said contract.

18. This defendant, further answering paragraph VIII of said bill, admits that on the 3rd day of December, 1931, Wilson & Co., Inc. of Oklahoma, a Delaware corporation, filed its petition in the District Court of Oklahoma County, Oklahoma, against the complainant Oklahoma Gas & Electric Company and the Fidelity & Casualty Company of New York. This defendant denies that the said Delaware corporation in said suit seeks to enforce the said order

of the said Corporation Commission of Oklahoma. This defendant admits that the Delaware corporation seeks to collect a large sum of money from the complainant Oklahoma Gas & Electric Company; and from the Fidelity & Casualty Company of New York, and that a copy of the said petition is attached to the said bill and marked "Exhibit D." This defendant denies that the said Delaware corporation is a successor of this defendant, and says that the said Delaware corporation is an assignee of the rights of this defendant upon certain bonds or contracts executed by the Oklahoma Gas & Electric Company and the Fidelity & Casualty Company of New York, as surety, and that said [fol. 46] suit now pending in the District Court of Oklahoma County, is a suit to enforce said bonds or contracts, and is not a suit to enforce the order of the Corporation Commission requiring the Oklahoma Natural Gas Company to furnish gas to this defendant or to the Delaware corporation. This defendant, further answering, denies that this said suit filed and commenced in the District Court of Oklahoma County should or can be enjoined by this Court; that this Court has no power or jurisdiction, right, or authority to enjoin said suit. This defendant, further answering, admits that the Oklahoma Gas & Electric Company is the only plaintiff in this suit that has any interest in, or is a party to the suit filed by the Delaware corporation in the District Court of Oklahoma County, and that the interest of the plaintiff is not joint, and that paragraph VIII of the said bill is improperly joined in this cause of action. This defendant, further answering, says that this defendant and the Corporation Commission of the State of Oklahoma, and its members and the Attorney General of the State of Oklahoma are not parties to, and have no interest in the suit pending in the District Court of Oklahoma County, and the liability of the defendants as set forth in paragraph VIII is not joint, and said paragraph VIII is improperly joined in this bill. This defendant, further answering, denies that the cause of action set up by the Delaware corporation in the suit filed in the District Court of Oklahoma County is based upon the alleged validity of the order of the Corporation Commission or is based upon the order of the Corporation Commission. The said order of the Corporation Commission is directed against the Oklahoma Natural Gas Company and no other complainant.

in this cause, and is not directed against, and cannot be enforced against the Oklahoma Gas & Electric Company; that the said suit pending in the District Court of Oklahoma County is a suit based upon the contract or bond of the Oklahoma Gas & Electric Company and the Fidelity & Casualty Company of New York, and is not filed to harass or annoy the Oklahoma Gas & Electric Company. This defendant, further answering, denies that a determination and decision of this Court that the said order of the Corporation Commission was invalid would bar the Delaware corporation from maintaining its action against the Oklahoma Gas & Electric Company and its surety, the Fidelity & Casualty Company of New York, based upon the bonds and contracts sued on in the suit now pending in the District Court of Oklahoma County. This defendant further denies that this Court has jurisdiction to determine the validity of said order of the Corporation Commission.

19. This defendant, further answering, denies that unless restrained and enjoined the Corporation Commission will enforce the said order against the Oklahoma Natural Gas Company. This defendant, further denies that the action in the District Court of Oklahoma County is an attempt to enforce said order of the Corporation Commission or is an attempt to compel the Oklahoma Natural Gas Company to furnish gas to either this defendant or the Delaware corporation. This defendant, further answering, denies that the prosecution of the action now pending in the District Court of Oklahoma County will result in irreparable loss and damage to the complainants or either or any of them, or will constitute the taking of property without full compensation and without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

20. This defendant, further answering, says that the said order of the Corporation Commission is not binding upon, or enforceable against the Oklahoma Natural Gas Corporation. This defendant, further answering, denies that disobedience to said order by any or either of said complainants will subject them to fines or penalties, and that the complainants will be deprived of their property without due process of law or will be denied equal protection of the laws.



21. This defendant, further answering, says that no action can be taken against these plaintiffs, or any or either of them, founded upon any matter or thing set up in said bill, except by bringing an action at law in some court of competent jurisdiction; that the said complainants, and each of them, have an adequate remedy at law in defending any such suit or action, and this Court is without power or jurisdiction to enjoin either or any of the defendants from bringing any action at law against either or any of these plaintiffs.

22. As a defense of law appearing upon the face of the Bill of Complaint this defendant says:

(a) That the plaintiffs have not in and by their said bill made or stated such case as entitled them in this court of equity to any recovery or relief from or against this defendant touching the matters contained in said Bill of Complaint.

[fol. 48] (b) It appears from paragraph III of said bill that the ground of jurisdiction is that it is a suit in equity under and involving the construction and application of the constitution and laws of the United States; and by paragraph VII of said bill that the sole claim arising under the constitution and laws of the United States is that the order of the Corporation Commission constitutes the appropriation of the property of the plaintiff Oklahoma Natural Gas Company for public use without just compensation, and deprives the Oklahoma Natural Gas Company of its property without due process of law, contrary to and in violation of the Fourteenth Amendment of the Constitution of the United States; that it does not appear from said bill that the property of the plaintiff, Oklahoma Gas & Electric Company, is taken in violation of the constitution and laws of the United States and the Oklahoma Gas & Electric Company is improperly joined as a plaintiff. The only claim that the constitutional rights of Oklahoma Gas & Electric Company are violated by said order is founded on an illegal contract or conspiracy in restraint of trade or commerce entered into between the plaintiffs, Oklahoma Gas & Electric Company and Oklahoma Natural Gas Company, as will more fully appear from paragraph VII of said bill.

(c) That it appears in and by said bill that the plaintiffs do not come into this court of equity with clean hands. It appears from paragraph VII of said bill that those plaintiffs are seeking the aid of this court of equity to enable them to carry out an illegal conspiracy in restraint of trade or commerce within the State of Oklahoma, in violation of section 11017 of Compiled Oklahoma Statutes (1921).

(d) That so much of paragraph VIII of said bill as sets up the suit filed in the District Court of Oklahoma County, Oklahoma, should be stricken from the bill, because it does not appear from said bill that this Court has any jurisdiction to enjoin the said suit, and it does not appear from said bill that there is a federal question in said suit. It appears from said bill that said suit was filed against only one of the plaintiffs, Oklahoma Gas & Electric Company, and that the other plaintiffs cannot be joined in a suit to enjoin the said suit pending in the District Court of Oklahoma County, Oklahoma. It appears from the said bill that the cause of action set up in paragraph VIII is not joint as to all the defendants, and cannot be joined with the cause of action seeking to enjoin the enforcement of [fol. 49] the order of the Corporation Commission, under Equity Rule 26; that the cause of action set up in paragraph VIII is not joint as to all of the plaintiffs and cannot be joined with the cause of action seeking to enjoin the enforcement of the order of the Corporation Commission under Equity Rule 26. It appears from said bill that the said suit filed in the District Court of Oklahoma County, Oklahoma, is a suit founded upon bonds and agreements entered into by the Oklahoma Gas & Electric Company and is to enforce said bonds and agreements, and is not a suit to enforce the order of the Corporation Commission requiring the Oklahoma Natural Gas Company to furnish gas to this defendant; that Wilson & Co., Inc. of Oklahoma, a Delaware corporation, plaintiff in the suit filed in the District Court of Oklahoma County, Oklahoma, is a necessary party to a suit to enjoin the prosecution of that suit; that the said Delaware corporation has no interest in any other matter or thing alleged in said Bill of Complaint, and is improperly joined as a defendant in this suit.

(e) That this Court cannot, in this suit, reverse, set aside, or vacate the affirmance of the order of the Corporation Commission by the Supreme Court of Oklahoma, and

an injunction issued by this court enjoining the enforcement of said order against the Oklahoma Natural Gas Company and/or its successors, would constitute no defense to a suit on the bonds and agreements entered into by the Oklahoma Gas & Electric Company and would not be sufficient grounds for equitable relief.

(f) This Court is prohibited by statute from enjoining the said case filed in the District Court of Oklahoma County, Oklahoma.

(g) Paragraph III of said bill should be stricken, as a mere conclusion of law, as it states no facts in support of this conclusion.

(h) Paragraph VI of said bill should be stricken, as a mere conclusion of the pleader.

(i) That so much of paragraph VII of said bill as alleges that the property of Oklahoma Natural Gas Company is taken for public use without just compensation or without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, should be stricken as it fails to state any facts that show that its property is taken without due process or for public use [fol. 50] without just compensation, the allegation being a mere conclusion of the pleader, unsupported by any facts.

(j) That so much of paragraph VII of said bill as alleges that the property, property rights and remunerative business of Oklahoma Gas & Electric Company is taken without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States should be stricken from said bill, as a mere conclusion of the pleader, unsupported by any facts; that it further appears in and by said bill that said conclusion is founded upon the illegal verbal contract set up in paragraph VII of said bill.

(k) That so much of paragraph VII of said bill as alleges that said order is contrary to Section 10 of Article I of the Constitution of the United States, should be stricken, as said verbal contract is an illegal conspiracy in restraint of trade or commerce within the State of Oklahoma, in violation of Section 11017 of the Compiled Oklahoma Statutes (1921).

(l) That it appears from paragraph VII of said bill that the Federal jurisdiction is founded on separate rights of the plaintiffs and not upon joint rights or titles, and that there is a misjoinder of plaintiffs in said bill.

(m) It appears from said Bill of Complaint that the plaintiffs are seeking an interlocutory injunction under Section 266 of the Judicial Code, 28 U. S. C. A. 380; that the three-judge court constituted under Section 266 is without jurisdiction to make any order or grant any relief as to this defendant.

(n) That the following language contained in paragraph VIII of said bill should be stricken from the bill as a mere conclusion of the pleader, unsupported by any facts set up in the said bill.

"That said Wilson & Company, Inc. of Oklahoma, the Delaware corporation, plaintiff in said cause so filed in the District Court of Oklahoma County, is but the successor or assignee and stands in the shoes of said Wilson & Company, Inc. of Oklahoma, the Oklahoma corporation, and as such has only such rights as said Wilson & Company, Inc., the Oklahoma corporation, had and can claim no greater or further rights than said Oklahoma corporation has or had.

"That for the reasons hereinbefore set fourth said order [fol. 51] is invalid and unenforceable, and because thereof said Wilson & Company, Inc., the Delaware corporation, as well as the Oklahoma corporation of the same name, does not have, and could not have, any possible cause of action against said Oklahoma Gas and Electric Company and Fidelity & Casualty Company of New York; that the commencement and prosecution of said action in said state court is an attempt on the part of the said Wilson & Company, Inc., the Delaware corporation, to enforce and make effective the said illegal and void order of the Corporation Commission of the State of Oklahoma and to obtain the same benefits and enjoyment therefrom and thereunder as if said order were valid and legal; that the commencement and prosecution of said action in said state court harasses and annoys complainants and was commenced, and is being prosecuted, for the purpose of harassing and annoying complainants and is an attempt on the part of said Wilson & Company, Inc., to obtain fruits and benefits under such illegal, invalid and void order of the same character, to



the same extent, and of the same force and effect as if said order were in fact valid and legal."

(o) It appears from said bill that the matters and things therein contained are not within the jurisdiction of this Court, for the reason that it is an attempt, by this proceeding, to enjoin, reverse, or modify the judgment of the Supreme Court of the State of Oklahoma. This Court is without power to enjoin the enforcement of said judgment of the State Supreme Court.

(p) It appears from said bill that all issues between the plaintiffs and this defendant were adjudicated in the proceedings before the Corporation Commission, and upon appeal to the Supreme Court of the State of Oklahoma, and that the decision of the Supreme Court of Oklahoma is res adjudicata of all questions in controversy between this defendant and the plaintiffs.

Wherefore, defendant denies that the plaintiff is entitled to the relief prayed for in the Bill of Complaint, or any part thereof, or to any other relief against this defendant, and prays that the Bill of Complaint be dismissed with costs.

Oklahoma Packing Company, by W. R. Brown, C. D. Bennett, Its Attorneys.

[fol. 52] *Duly sworn to by W. M. Martin. Jurat omitted in printing.*

### EXHIBIT "A" TO ANSWER

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLA-  
HOMA

Cause No. 7052

WILSON & COMPANY, INC., OF OKLAHOMA, Plaintiff,  
vs.

OKLAHOMA NATURAL GAS COMPANY, A CORPORATION, AND OKLA-  
HOMA GAS & ELECTRIC COMPANY, A CORPORATION, Defend-  
ant

Supersedeas Bond

Know All Men By These Presents:

That the Oklahoma Gas and Electric Company, a corpora-  
tion, as principal, and The Fidelity and Casualty Company

of New York as surety, are held and firmly bound unto Wilson & Company, a corporation, in the sum of Twenty-five Thousand (\$25,000.00) Dollars, for the payment of which well and truly to be made, we do hereby bind ourselves, our heirs and assigns.

The conditions of the foregoing obligations are such that, Whereas, on the 13th day of April, 1926, the Corporation Commission of the State of Oklahoma entered its order #3388 in cause No. 7052; and

Whereas, the said Oklahoma Gas and Electric Company has appealed from the said Order of the Corporation Commission to the Supreme Court of Oklahoma; and

Whereas, pending said appeal, the said Corporation Commission did on the 26th day of April, 1926, by journal entry No. 1453 in cause No. 7052 suspend and supersede the said order No. 3388, pending the final termination of said appeal, [fol. 53] upon the filing and approving of a bond in the sum of \$25,000.00 with the Clerk of said Commission.

Now, Therefore, if the said Oklahoma Gas and Electric Company shall pay to the said Wilson & Company, a corporation, all amounts collected by said Oklahoma Gas and Electric Company in excess of the rate established by said Order No. 3388 for gas supplied said Wilson & Company, together with 6% per annum on any such amount, or amounts, from and after the 23rd day of April, 1926, pending the decision of the Supreme Court on said appeal, in event the said appeal shall be affirmed, in whole or in part or if the appeal should be dismissed then and in that event this obligation shall be null and void; otherwise to remain in full force and effect.

Oklahoma Gas and Electric Company, by J. F. Owens, Vice-President (Principal), The Fidelity & Casualty Co. of New York, by J. F. Butler, Resident Agent (Surety).

Approved and filed this — day of —, 1926.

— — —, Corporation Commission.

## EXHIBIT "B" TO ANSWER

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 17,859

OKLAHOMA GAS & ELECTRIC COMPANY, A CORPORATION, AND  
OKLAHOMA NATURAL GAS COMPANY, A CORPORATION, Plain-  
tiff in Error,

VS.

WILSON & COMPANY, INCORPORATED, OF OKLAHOMA, THE STATE  
OF OKLAHOMA AND THE CORPORATION COMMISSION OF THE  
STATE OF OKLAHOMA, Defendants in Error

## Additional or Supplemental Supersedeas Bond

Know All Men By These Presents:

That the Oklahoma Gas & Electric Company, a corporation, as principal and the Fidelity and Casualty Company of New York, as Surety, are held and firmly bound unto Wil-  
[fol. 54] son & Company Incorporated of Oklahoma, in the sum of Fifteen Thousand (\$15,000.00) Dollars for the payment of which well and truly to be made we do hereby bind ourselves, our heirs and assigns.

The condition of the foregoing obligation is such that whereas, on the 13th day of April, 1926, the Corporation Commission of the State of Oklahoma entered its order No. 3388 in Cause No. 7052, and

Whereas, the said Oklahoma Gas & Electric Company has appealed from said order of the Corporation Commission to the Supreme Court of The State of Oklahoma, and

Whereas, pending said appeal the said Corporation Commission did on the 26th day of April, 1926, by Journal Entry No. 1453 in Cause No. 7052 suspend and supersede the said Order No. 3388, pending the final termination of said appeal upon the filing and approving of a bond in the sum of Twenty-five Thousand (\$25,000.00) Dollars with the Clerk of said Commission, which bond was executed, approved and filed, and

Whereas, Wilson & Company Incorporated of Oklahoma has filed an application in this cause asking that an additional bond be given to further secure Wilson & Company Incorporated of Oklahoma on account of the additional po-

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tential liability incurred hereunder by reason of the passage of time and the said Oklahoma Gas & Electric Company having agreed to execute additional security.

Now, Therefore, if the said Oklahoma Gas & Electric Company shall pay to the said Wilson & Company Incorporated of Oklahoma all amounts collected by said Oklahoma Gas & Electric Company in excess of the rate established by said Order No. 3388 for gas supplied said Wilson & Company Incorporated of Oklahoma, together with six (6%) per cent per annum interest on any such amount or amounts from and after the 23rd day of April, 1926, pending the decision of the Supreme Court on said Appeal, in the event the said appeal shall be affirmed in whole or in part, or if the appeal should be dismissed, then in that event this obligation shall be null and void, otherwise to remain in full force and effect.

This bond shall not be in lieu of the Twenty-five Thousand [fol. 55.] (\$25,000.00) Dollar bond hereinbefore referred to but shall be an additional and supplemental security.

Oklahoma Gas and Electric Company, by \_\_\_\_\_.  
The Fidelity & Casualty Co. of New York, by \_\_\_\_\_.  
\_\_\_\_\_, Surety. \_\_\_\_\_, Corporation Commission.

#### EXHIBIT "C" TO ANSWER

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 17,859

OKLAHOMA GAS & ELECTRIC COMPANY, a Corporation, and  
Oklahoma Natural Gas Company, a Corporation, Plaintiff in Error,

vs.

WILSON & COMPANY, INCORPORATED, OF OKLAHOMA, the State  
of Oklahoma and the Corporation Commission of the  
State of Oklahoma, Defendants in Error

#### Additional or Supplemental Supersedeas Bond

Know All Men By These Presents:

That the Oklahoma Gas & Electric Company, a corporation, as principal and the Fidelity and Casualty Company of New York, as Surety, are held and firmly bound unto Wilson & Company Incorporated of Oklahoma, in the sum

of Ten Thousand (\$10,000.00) Dollars, for the payment of which well and truly to be made we do hereby bind ourselves, our heirs and assigns.

Dated this the 6th day of July, 1927.

The condition of the foregoing obligation is such that whereas, on the 13th day of April, 1926, the Corporation Commission of the State of Oklahoma entered its order No. 3388 in Cause No. 7052, and

Whereas, the said Oklahoma Gas & Electric Company has [fol. 56] appealed from said order of the Corporation Commission to the Supreme Court of The State of Oklahoma, and

Whereas, pending said appeal the said Corporation Commission did on the 26th day of April, 1926, by Journal Entry No. 1453 in Cause No. 7052 suspend and supersede the said Order No. 3388, pending the final termination of said appeal upon the filing and approving of a bond in the sum of Twenty-five Thousand (\$25,000.00) Dollars with the Clerk of said Commission, which bond was executed, approved and filed, and

Whereas, on or about the 27th day of December, 1926, said Oklahoma Gas & Electric Company executed and filed an additional bond in the penalty of Fifteen Thousand (\$15,000.00) Dollars to further secure Wilson & Company Incorporated of Oklahoma on account of the additional potential liability incurred hereunder by reason of the lapse of time, and

Whereas, Wilson & Company Incorporated of Oklahoma has requested that additional bond be given to further secure it on account of the additional potential liability incurred hereunder by reason of the further lapse of time, and the said Oklahoma Gas & Electric Company having agreed to comply with said request of Wilson & Company to execute further and additional security;

Now, Therefore, if the said Oklahoma Gas & Electric Company shall pay to the said Wilson & Company Incorporated of Oklahoma all amounts collected by said Oklahoma Gas & Electric Company in excess of the rate established by said Order No. 3388 for gas supplied said Wilson & Company Incorporated of Oklahoma, together with six (6%) per cent per annum interest on any such amount or amounts from and after the 23rd day of April, 1926, pending the decision of the Supreme Court on said Appeal, in the event the said appeal shall be affirmed in whole or in part, or if the

appeal should be dismissed, then in that event this obligation shall be null and void, otherwise to remain in full force and effect.

This bond shall not be in lieu of the Twenty-five Thousand (\$25,000.00) Dollars and the Fifteen Thousand (\$15,000.00) [fol. 57] Dollar bond, or either of them, heretofore referred to, but shall be additional and supplemental security.

Oklahoma Gas and Electric Company, by ———, Vice-President (Principal). The Fidelity & Casualty Co. of New York, by ———, Resident Agent. ———, (Surety).

# IN UNITED STATES DISTRICT COURT

ANSWER OF CORPORATION COMMISSION ET AL.—Filed June 9, 1932

The Corporation Commission of the State of Oklahoma, Paul Walker, C. C. Childers and E. R. Hughes, members of said Commission, and J. Berry King, Attorney General of the State of Oklahoma, defendants in the above-entitled cause, answering the Bill of Complaint, do hereby adopt as their answer to the bill filed in this case, the answer made and filed for and on behalf of the defendant, Oklahoma Packing Company.

The Corporation Commission of the State of Oklahoma, Paul Walker, C. C. Childers, E. R. Hughes, Members of Said Commission; J. Berry King, Attorney General of the State of Oklahoma, by W. C. Lewis, Their Attorneys.

# IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Nov. 28, 1932

We find *find* from the verified bill of plaintiffs and the affidavits of the parties, introduced at the hearing of the plaintiffs' application for a temporary injunction, the following facts:

Wilson & Company, of Oklahoma, a Delaware corporation, [fol. 58] owns and operates a packing house, a short

distance south of Oklahoma City, Oklahoma, but within the city gate hereinafter mentioned. The predecessor of the company was the Oklahoma Packing Company, whose former name was Wilson & Company of Oklahoma, an Oklahoma corporation.

The Oklahoma Gas & Electric Company, during the time here involved, has owned a system of mains and service pipes for the distribution of natural gas in Oklahoma City, Oklahoma.

The Oklahoma Natural Gas Company and later its successor, the Oklahoma Natural Gas Corporation, has since the date prior to May, 1907, been engaged in procuring and transporting natural gas to various cities in Oklahoma and distributing such gas in some of them, but not locally in Oklahoma City. On that date that company had entered into a contract to furnish and since that date has furnished natural gas to the Oklahoma Gas & Electric Company, for distribution by the latter in Oklahoma City, in consideration that the latter would pay the former a fixed percentage of collections for the gas.

That company established a measuring station at the city gate, outside of Oklahoma City, where it sold gas to the Oklahoma Gas & Electric Company on a volume basis, at the city gate rate fixed by the Commission, for distribution by that company in Oklahoma City. The Oklahoma Natural Gas Company has since been serving large industrial users of gas, at that rate, near large cities, particularly Tulsa and Sapulpa. Before the city gate was established, it served gas to users within that gate, but outside of Oklahoma City. As a fair inference we find all customers mentioned in this paragraph were similar to Wilson & Company.

In 1921, the Oklahoma Natural Gas Company agreed with the Oklahoma Gas & Electric Company not to serve gas to customers inside that gate as long as the Oklahoma Gas & Electric Company should distribute gas in Oklahoma City and buy the gas therefor from the Oklahoma Natural Company, and that agreement has been kept. Since that time, the Oklahoma Natural Gas Company and its successor have been serving gas to customers as it saw fit, from its main line leading to Oklahoma City, outside the city gate. All the gas used by Wilson & Company has been sold to that [fol. 59] company by the Oklahoma Gas & Electric Company, continuing off and on since 1916. All rates of the latter are fixed by the Commission.



The city gate rate fixed by the Commission was 35c for the first 100,000 cu. ft. and 15c per thousand cu. ft. in excess, if the consumption was of 15,000,000 cu. ft. per month. Wilson & Company has always consumed more than that amount. The Oklahoma Gas & Electric Company purchased of the Oklahoma Natural Gas Company a short service pipe line leading to the plant of Wilson & Company and resold to Wilson & Company at a profit of 5c per thousand cu. ft. the gas delivered by the Oklahoma Natural Gas Company through that line.

The course of the proceedings and litigation among the parties has been fully stated in our opinion of this date and need not be repeated.

### CONCLUSIONS OF LAW

We hold that the motion to dismiss the bill because the suit was not brought in Delaware, where Wilson & Company of Oklahoma is chartered, is untenable, as that company became an inhabitant of this state, by complying with its laws and conducting its packing plant herein.

The motion to dismiss the bill on other grounds is not well founded and should be overruled.

The order of the Commission in question was only legislative in character, and the affirmance thereof by the state Supreme Court was only with legislative force.

The bill alleges the required amount in controversy to bring the suit within the jurisdiction of this court, and a valid cause of action in favor of both plaintiffs against all the defendants is pleaded in the bill.

The bill is not multifarious and the complaint made therein is properly subject to hearing and determination in this court.

The said oral agreement between the Oklahoma Natural Gas Company and the Oklahoma Gas & Electric Company, whereby the latter alone was to serve gas to consumers within the city gate, and the former was to abandon such service was and is contrary to public policy and void.

[fol. 60] The Commission was invested with the power to make the order in question, requiring the Oklahoma Natural Gas Company to furnish gas to Wilson & Company at the said city gate rate, and that said order was in all respects authorized by law and valid.

We hold that the plaintiffs' application for a temporary injunction should be denied.

November 28, 1932.

John H. Cotteral, Circuit Judge; F. E. Kennamer,  
District Judge; Edgar S. Vaught, District Judge.

IN UNITED STATES DISTRICT COURT

OPINION ON APPLICATION FOR A TEMPORARY INJUNCTION AND  
MOTION TO DISMISS BILL—Filed Nov. 28, 1932

Before Cotteral, Circuit Judge, and Kennamer and Vaught,  
District Judges

PER CURIAM:

The plaintiffs brought a suit in this court against Wilson & Company, of Oklahoma, the Corporation Commission of Oklahoma, and the Attorney General of the state, to enjoin the enforcement of an order of the Commission, No. 3388, dated April 13, 1926, requiring the Oklahoma Natural Gas Company to supply gas to Wilson & Company at the city gate rate of 35c for the first 100,000 cu. ft. and 15c per thousand for the excess; provided the consumption should be of 15,000,000 cu. ft. per month, on the condition Wilson & Company purchase or install the service line to its plant.

There was an appeal from the order of the Commission to the state Supreme Court, supersedeas bonds were given by the Oklahoma Gas & Electric Company, and that court affirmed the order, 288 Pac. 316. The suit referred to followed in this court and it was dismissed on motion of the defendants, but that decree was reversed on appeal by the Circuit Court of Appeals. 54 F. (2d) 596. In that case, the grounds of the original suit are set forth.

[fol. 61] The plaintiffs later filed an amended and supplemental bill, seeking also an injunction before three judges against prosecution of a suit upon said supersedeas bonds by Wilson & Company of Oklahoma, the Delaware corporation, in the Oklahoma County state district court. Later, the suit in this court was dismissed by the plaintiffs without prejudice, because of the ruling there made that it had waived the right to a three-judge court by submitting the original motion for dismissal to the District Judge.

Thereafter, the present suit was commenced, asking for the same relief as in the original suit, and a temporary injunction is now sought before this court, composed of three judges. That application has been submitted on the verified bill and affidavits, and stands for decision upon the several questions of fact and law presented thereon, and further the motion of Wilson & Company to dismiss the bill has been submitted. Of the contentions advanced by the defense, we notice those deemed serious or important.

It is insisted the suit may not be maintained against the Delaware corporation, because section 112, U. S. Code, section 51 Jud. Code, forbids, a suit against any person in any other district than that whereof he is an inhabitant, when the suit is not founded on diverse citizenship. That section does not affect the jurisdiction of the court, conferred by section 24, Jud. Code, but pertains to venue, which may be waived. *Lee v. Chesapeake & Ohio Ry.*, 260 U. S. 653, 655. But the Delaware corporation became, for the purpose of suit, an inhabitant of the Western District of Oklahoma, where it proceeded to buy and conduct a packing plant, in compliance with the state law. *Dodge v. Patten*, 60 F. (2d) 676.

The defense seeks a review of the decision of the Circuit Court of Appeals that the order of the Commission was upheld by the state Supreme Court only with legislative force. We decline to reconsider that question, regarding it as settled in this case.

The jurisdiction of this court is challenged, because the bill does not allege the requisite amount to be in dispute and the Oklahoma Gas & Electric Company makes no complaint under the federal constitution or laws. But both were parties to the proceeding before the Commission. The order of the Commission required certain service by the Oklahoma Natural Gas Company and deprived the Oklahoma Gas & Electric Company of the patronage of Wilson & Company. In seeking relief where both companies were thus concerned, we think the averment of the jurisdictional amount was sufficient. And a federal controversy was alleged because the order of the Commission if upheld requires a taking of the property of both, without due process of law.

The bill is assailed as multifarious in seeking distinct relief by the two plaintiffs. But both are interested as the order adversely and directly affects them. And the objec-

tion is one of inconvenience. *Graves v. Ashburn*, 215 U. S. 331. Separate suits are quite unnecessary and the whole controversy should be heard, as the issues are not complex and they may be appropriately and conveniently determined in one suit.

The defense asserts that the suit in the state court may not be enjoined, under the doctrine that suits for the same relief in the federal and state courts may proceed independently, unless the custody of property is involved. That rule is no longer in doubt. *Grubb v. Public Utilities Co.*, 281 U. S. 470, 476. But it is not here involved. The remedy plaintiffs seek is to enjoin the prosecution of the state court suit, because it was brought for the enforcement of bonds given to stay its order, alleged to constitute a taking of property without due process of law.

The power of the Commission to make the order in question depended upon the fact that the Oklahoma Natural Gas Company had professed to serve gas to customers in a similar situation with Wilson & Company. The finding of the Commission was it is serving large industrial users of gas near other large cities, particularly near Tulsa and Sapulpa, and before the city gate was established it served gas to users within that gate, outside of Oklahoma City. If the Oklahoma Natural Gas Company had professed to render service to such users as Wilson & Company, the Commission was authorized to require it in favor of that company. *Oklahoma Natural Gas Company v. Corporation Commission*, 211 Pac. 401; *In re Vance*, and *Oklahoma Natural Gas Co. v. Scott et al.*, 115 Okla. 8, 241 Pac. 164; 51 C. J. 7. A public utility is not entitled to abandon a public service without leave of the state. 51 C. J. 8. But the plaintiffs denied they ever made such profession, thereby challenging the foundation of the order. In arriving at the facts, the findings of the Commission are to be regarded as presumably correct, until clearly overcome. 51 C. J. 66. [fol. 63] The contention that the Oklahoma Natural Gas Company served gas in Oklahoma City is based on the theory of agency, through the local distribution system of the Oklahoma Gas & Electric Company. The former furnished the gas to the latter, under a contract of May, 1907, for a percentage of collections realized by the latter company. The latter at one time made that claim. *Oklahoma Gas & Electric Company vs. Oklahoma Natural Gas Company*, 85 Okla. 25, 205 Pac. 768. But practically the contract



was merely a means of effecting payment for the gas. As the Oklahoma Natural Gas Company did not at the time have a franchise to distribute gas in Oklahoma City, there could be no legitimate contract of agency. Besides, the contract was canceled by the Commission on June 25, 1921. Ex. B, plaintiffs' bill. And in lieu of it, the Commission, in 1921, fixed the rate to be charged by the Oklahoma Natural Gas Company at the city gate, or measuring station, located near but outside of the city. Ex. B, supra.

We advert to the facts respecting the services by the Oklahoma Natural Gas Company of gas near the city. The packing plant of Wilson & Company is located in the area within the city gate but outside of the city. The Oklahoma Natural Gas Company and the Oklahoma Gas & Electric Company orally agreed in 1921 the Oklahoma Gas & Electric Company was to supply all gas to consumers within the city gate, as long as it distributed gas in Oklahoma City and took it from the Oklahoma Natural Gas Company. The Oklahoma Natural Gas Company was theretofore serving customers in the area later located within the city gate. It has since been serving gas to large industrial users near large cities, particularly Tulsa and Sapulpa. Pursuant to the agreement, it has since never served any customer within the city gate, never served gas to Wilson & Company, and it has served only such customers as it saw fit from its main line leading to Oklahoma City.

In 1921, the Oklahoma Natural Gas Company constructed the measuring station at the city gate, and thereafter all gas was measured there and delivered to and paid for by the Oklahoma Gas & Electric Company on a volume basis, pursuant to a rate fixed by the Commission. The Oklahoma Natural Gas Company sold to the Oklahoma Gas & Electric Company a short service pipe line, through which the former delivered the gas to Wilson & Company, for which the Oklahoma Gas & Electric Company charged a profit of 5c per thousand cubic feet. The gas used by Wilson & Company has always been sold to it by the Oklahoma Gas & Electric Company, continuing off and on since 1916.

The affidavits of plaintiffs assert that the Oklahoma Natural Gas Company never served any customer situated as is Wilson & Company. But it was a conclusion, and no definite facts were set forth on which that claim was based. We have therefore found its customers near the cities, to

whom we have referred, were industrial customers similar to Wilson & Company.

We regard it as unimportant that the company, as it agreed, after the city gate near Oklahoma City was established, served gas to customers located only outside that gate. The test is whether its sales were to industrial customers similarly situated with Wilson & Company, in any locality. Finding they were, we hold the Commission had the power to make the order in question on that ground.

The agreement of the Oklahoma Natural Gas Company and the Oklahoma Gas & Electric Company is assailed as being contrary to public policy and invalid, in being made for the abandonment of service between competing companies near Oklahoma City. The Oklahoma Natural Gas Company under the agreement surrendered the service within the city gate to the Oklahoma Gas & Electric Company. The result was to enable that company to buy the gas and sell it to Wilson & Company at a profit over the city gate rate. The agreement must therefore be condemned as impairing the discharge of a duty of the Oklahoma Natural Gas Company and its successor to the public. *Oklahoma Gas & Elec. Co. v. Oklahoma Natural Gas Co.*, 85 Okl. 25, 205 Pac. 768; *Thomas v. Railroad Co.*, 101 U. S. 71; *Gibbs v. Baltimore Gas Company*, 130 U. S. 396. We conclude that the Oklahoma Natural Gas Company and later its successor were bound to continue the public service it was professing to render near Oklahoma City when the agreement was made, and that the Commission had the power to make and enforce that service at the city gate rate to Wilson & Company by the order in controversy.

The motion to dismiss the bill must be overruled because a cause of action is pleaded. But the application for a temporary injunction must be denied. Order will be entered accordingly.

[fol. 65] IN UNITED STATES DISTRICT COURT

ORDER DENYING APPLICATION FOR A TEMPORARY INJUNCTION  
—Filed November 28, 1932

The application of the plaintiffs for a temporary injunction, enjoining pendente lite the enforcement of the order of the Corporation Commission of Oklahoma, number 3388, dated April 13, 1926, and the prosecution of the suit brought

in the District Court of Oklahoma County, Oklahoma, by Wilson & Company, upon the supersedeas bonds given in the proceeding in appeal from the said order to the Supreme Court of Oklahoma, comes on to be determined, after the said application was heard upon the bill and affidavits of the parties and thereafter fully argued, and pursuant to the submission thereof, it is this day

Ordered that said application be and it is denied. The plaintiffs thereupon except to said order.

November 28, 1932.

John H. Cotteral, Circuit Judge. F. E. Kennamer,  
District Judge. Edgar S. Vaught, District Judge.

# IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO DISMISS BILL—Filed November 28, 1932

The motion of the defendant to dismiss the Bill of plaintiffs comes on to be determined, after the same was fully argued by counsel, and pursuant to the submission thereof, and the court, being fully advised, it is this day

Ordered That said motion be and the same is overruled. The defendants thereupon except to said order.

November 28, 1932.

John R. Cotteral, Circuit Judge. F. E. Kennamer,  
District Judge. Edgar S. Vaught, District Judge.

[fol. 66] IN UNITED STATES DISTRICT COURT

ANSWER OF WILSON & CO., INC., OF OKLAHOMA—Filed December 1, 1932

Wilson & Co., Inc. of Oklahoma, a Delaware corporation, defendant, reserving to itself the benefit of its objection to being sued in the Western District of Oklahoma, answering the Bill of Complaint, does hereby adopt as its answer to the bill filed in this cause, the answer made and filed for and on behalf of the defendant Oklahoma Packing Company.

Wilson & Co., Inc. of Oklahoma, By Bennett & Bennett, W. R. Brown, Its Attorneys.

## IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL ANSWER OF WILSON & CO., INC. OF OKLAHOMA,  
A DELAWARE CORPORATION, TO THE BILL OF COMPLAINT—  
Filed May 19, 1933

Now comes the defendant, Wilson & Co., Inc. of Oklahoma, a Delaware corporation, and by leave of court first had and obtained, files this, its Supplemental Answer to the Bill of Complaint of the plaintiffs filed herein and alleges:

1. Since the filing, on or about the 9th day of June, 1932, of this defendant's original answer to said bill of complaint, the action brought by this defendant in the District Court of Oklahoma County, Oklahoma, against the complainant herein, Oklahoma Gas & Electric Company, and Fidelity & Casualty Company of New York, referred to in paragraph VIII of the bill of complaint, has been brought on for trial before the District Court of Oklahoma County, a jury being waived by both parties, and the court has made its findings of facts and conclusions of law and entered judgment thereon in favor of this defendant on 5th day of April, 1933; that said judgment is res judicata of all matters and things alleged in the bill of complaint touching this defendant.

Wherefore, this defendant prays judgment that the bill of complaint be dismissed as to this defendant with costs to this defendant.

Bennett & Bennett, W. R. Brown, Solicitors for Defendant, Wilson & Co., Inc. of Oklahoma, a Delaware Corporation.

[fol. 67] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON FINAL  
HEARING Filed Sept. 22, 1933

## I

We find the following facts in accord with the written stipulation of the parties:

## 1

At all the times mentioned in complainants' petition, the Oklahoma Natural Gas Company was a corporation engaged



in the business of the production of, transportation and sale of natural gas as a public utility, supplying gas at various towns and cities in Oklahoma for domestic and industrial consumption. It held franchises for local distribution in a few towns and cities, but none in Oklahoma City.

Wilson & Company, Inc., is a corporation operating a manufacturing plant situated in Oklahoma City southwest of and outside the corporate limits of the City of Oklahoma City. The Oklahoma Gas and Electric Company is a corporation, at all the times herein involved, engaged in the distribution of gas in Oklahoma City to domestic and industrial consumers in Oklahoma City and immediate vicinity, and operating under a franchise from the city. Prior to the promulgation by the Corporation Commission of what is known as the gate rate order in June, 1921, the Oklahoma Natural Gas Company was supplying the Oklahoma Gas and Electric Company with natural gas at Oklahoma City under contracts and arrangements on the percentage basis.

2

That at the time of making said gate rate order, and for some time prior thereto, there were only two reducing stations at, or through which the gas was reduced from high pressure to low pressure and delivered by said Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company, one of such stations being located at Thirty-sixth Street and Santa Fe Avenue, and the other being located at Pennsylvania and Reno Avenues, both of which stations were then outside the city limits of Oklahoma City, both of same being northerly or north of the city. All of the gas passing through the reducing station at Thirty-sixth Street and Santa Fe Avenue was gas from the north of Oklahoma City produced in the fields known as the Cushing, Kellyville, Depew and other fields in that general locality, which points are north and east of Oklahoma City, and was transmitted [fol. 68] by the pipe lines of the Oklahoma Natural Gas Company. During the year 1919, the Oklahoma Natural Gas Company built a transmission line to the gas field known as the Chickasha field near Chickasha, Oklahoma, southwest of Oklahoma City, and said line extended from said Chickasha field to Independence Avenue in Oklahoma City and thence proceeded north on said Independence Avenue nearly a mile west of the packing plant of Wilson & Company, Inc., extending on to Reno Avenue, thence east on

that avenue to the reducing station at Pennsylvania and Reno, said Reno Avenue being something over a mile north of said packing plant. The Oklahoma Natural Gas Company in 1921, constructed a six-inch gas line connected with its system and extending east and west through Ash Avenue west of Oklahoma City, and located about five or six hundred feet south of the engine room of Wilson & Company, Inc.; said gas line in Ash Street extended 1,500 feet east of Wilson & Company, Inc.'s plant, and connected with a meter or measuring station located at or immediately adjacent to the intersection of Hickory Street and Agnew Street, and within 200 feet of the city limits of the City of Oklahoma City; this gas line was constructed for use in such emergency as might arise by the washing out at the river crossings of its line on Independence Avenue; the said measuring station located at or near the intersection of Hickory Street and Agnew Street, remained in this location throughout the month of September, 1924, and for some time thereafter; in September, 1924, Agnew Street was, and still is, the city limits of Oklahoma City; the plant of Wilson & Company, Inc., of Oklahoma, was, in September, 1924, and now is, located immediately west of the intersection of Agnew and Hickory Streets; and approximately 1,500 feet outside the city limits of Oklahoma City.

The defendant, Oklahoma Gas and Electric Company, desired to serve gas to Wilson & Company, Inc., for fuel purposes and made an arrangement or agreement with the Oklahoma Natural Gas Company, in 1924, at some date following the month of September, to move its measuring station or meter from its location at or near the intersection of Agnew and Hickory Streets, to some point west of the plant of Wilson & Company, Inc., of Oklahoma, and the said measuring station was finally located at or near the intersection of Ash and May Avenues, approximately one-third of a mile west of Wilson & Company, Inc.'s plant, and approximately 3,000 feet west of Agnew Street, the city limits of [fol. 69] Oklahoma City. It was at first understood between the Oklahoma Natural Gas Company and the Oklahoma Gas and Electric Company that the measuring station should be located just south of the Wilson & Company, Inc., plant at the point where Wilson & Company, Inc., were to be served and the Oklahoma Gas and Electric Company on April 3, 1925, purchased that part of the Oklahoma Natural Gas Company's line between such point and the measuring

station at Hickory Street. The Oklahoma Gas and Electric Company constructed a service line extending from the main on Ash Avenue, to the boilerroom of Wilson & Company, Inc., and the necessary meters and measuring devices, a distance of about 450 feet.

## 3

Prior to the making of the gate rate order in 1921, the Oklahoma Gas and Electric Company had been supplying gas to users at Oklahoma City, both within and without the city limits. When the gate rate order was made and the Oklahoma Natural Gas Company was required to put in gates and measures, sell and deliver the gas to the Oklahoma Gas and Electric Company at said gates, there were several consumers of gas outside of and beyond the location of the gate stations, who had been supplied by the Oklahoma Gas and Electric Company, and in carrying out said order, it was agreed between the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company, with the assent of the Corporation Commission that the Oklahoma Natural Gas Company could, if it desired, continue to supply gas to such consumers outside the gate, and all or some of them were continued to be so supplied after said gate order by the Oklahoma Natural Gas Company. During 1924-1925-1926, the Oklahoma Natural Gas Company served gas to Lorris E. Cobb, R. S. Schuneman and Billie Gregg, outside of the city limits and outside the measuring stations. However, each of them consumed less than one hundred thousand cubic feet per month. No other consumers, except Billie Gregg, were furnished gas by the Oklahoma Natural Gas Company outside the said gates, except consumers over whose land its pipe line was laid, and except certain domestic customers who were outside the city gates or measuring stations on the lines of the Oklahoma Natural Gas Company and were being served by the Oklahoma Gas and Electric Company at the time of the gate rate order. [fol. 70] The Oklahoma Natural Gas Company never served consumers inside of the gates whose gas had been measured and charged to the distributing company. It had no desire to furnish any gas in competition with its biggest customer, the Oklahoma Gas and Electric Company, who was purchasing all its gas from the Oklahoma Natural Gas Company.

In September, 1924, the Oklahoma Natural Gas Company made its application to the Corporation Commission of the State of Oklahoma, to establish a reduction in rates for gas for industrial purposes; the Corporation Commission acted upon its application and by Journal Entry No. 1203, in Cause No. 6030, authorized the Oklahoma Natural Gas Company to establish rates for industrial gas of thirty-eight cents per thousand cubic feet, for the first 100,000 cubic feet, per month, and fifteen cents per thousand cubic feet, for all gas in excess of the first 100,000 cubic feet, per month, provided there was a minimum consumption of 30,000,000 cubic feet per month, per customer; said rates were to apply to consumers located outside of the city limits of the cities served by the Oklahoma Natural Gas Company; the Corporation Commission did, by the Journal Entry No. 3276, in Cause No. 5965, authorize the Oklahoma Natural Gas Company to reduce its rates to thirty-five cents per thousand cubic feet for the first 100,000 cubic feet, per month, and fifteen cents per thousand cubic feet, for all in excess of the first 100,000 cubic feet, per month, where the consumer used a minimum of 15,000,000 cubic feet per month; said rate became effective on January 1, 1926; it is admitted that the Oklahoma Natural Gas Company did, from and after January 1, 1926, furnish gas to Producers & Refiners Corporation, located immediately outside of Tulsa, Oklahoma, at the rate of thirty-five cents per thousand cubic feet, for the first 100,000 cubic feet, per month, and fifteen cents per thousand cubic feet for all over 100,000 cubic feet; that the consumption of the Producers & Refiners Corporation during the months of January, to and including the month of September, 1926, was from 45,898,000 cubic feet, to 65,287,000 cubic feet. Also the Oklahoma Natural Gas Company furnished industrial gas to several other industrial users at Sapulpa and Tulsa. The Oklahoma Natural Gas Company had franchises and owned and operated the gas distribution systems in the cities [fol. 71] of Sapulpa and Tulsa during all of the times herein involved.

In December, 1924, the Oklahoma Gas and Electric Company began serving gas to Wilson & Company, Inc., and built a service line from the six-inch line in Ash Street



to Wilson & Company, Inc.'s boilers. April 13, 1926, upon complaint of Wilson & Company, Inc., the Corporation Commission promulgated its Order No. 3388, which order required the Oklahoma Natural Gas Company to serve Wilson & Company, Inc., with gas at its industrial rate. Both the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company appealed to the Supreme Court and the Oklahoma Gas and Electric Company gave bond to supersede the execution of the order and supersedeas was ordered upon filing and approving bonds.

## 6

In the month of September, 1926, the Oklahoma Natural Gas Corporation purchased the natural gas system of Oklahoma Natural Gas Company and continued thereafter to operate the transmission and distribution systems in Oklahoma. As of March 1, 1928, the Oklahoma Natural Gas Corporation purchased the natural gas distributing systems of the Oklahoma Gas and Electric Company in the various cities and towns in Oklahoma, including Oklahoma City, and thereafter operated said distributing systems in said cities and towns. The Oklahoma Natural Gas Corporation concurrently, with the commencement of its operations of the gas distributing systems in said cities and towns previously owned and operated by Oklahoma Gas and Electric Company, placed in effect in said cities and towns its industrial gas rates that had theretofore been effective in other cities and towns, and on the general system owned and operated by Oklahoma Natural Gas Corporation. The Oklahoma Natural Gas Corporation after March 1, 1928, furnished gas to Wilson & Company, Inc., for boiler fuel purposes at its established rate of thirty-five cents for the first 100,000 cubic feet per month, and fifteen cents per 1,000 cubic feet, for all in excess thereof, during the months that the total consumption exceeded 15,000,000 cubic feet.

## 7

It is agreed that Billie Gregg's place where the Oklahoma Natural Gas Company served gas after the gate rate order [fol. 72] was located outside and beyond the city measuring stations and was approximately three miles north of Wilson & Company, Inc.'s plant and approximately a mile west of the city limits of Oklahoma City.

It is agreed that gas was furnished by Oklahoma Natural Gas Company to Oklahoma Gas and Electric Company through the measuring station located near the intersection of Hickory and Agnew Streets in the following quantities and during the following months, to-wit:

January, 1922	563,000 cubic feet
October, 1923	3,467,000 cubic feet
November, 1923	7,879,000 cubic feet

and that no other gas was measured through said measuring station from the date of its construction up to the date of its discontinuance. It is agreed that the first gas was metered through the measuring station constructed at Ash Street and May Avenue by Oklahoma Natural Gas Company to Oklahoma Gas and Electric Company in the month of December, 1924. Wilson & Company, Inc., intermittently purchased gas from the Oklahoma Gas and Electric Company for use for fuel under its boilers from the year 1916 or 1917, but did not purchase from the Oklahoma Gas and Electric Company, or use gas as fuel for its boilers, from the 14th day of May, 1923, until it commenced again in December, 1924. It is agreed, however, that from the date of the gate rate order in the year 1921, at or about which time the measuring stations were installed, Wilson & Company, Inc., purchased gas for miscellaneous incidental purposes at its plant from the Oklahoma Gas and Electric Company during each and every month up until December, 1924, and during some of said months purchased additional supplies of gas for fuel under its boiler plant.

## II

We find, in accord with paragraph 7 of the bill, admitted by paragraph 17 of the answer, that prior to and at the time of the making of the order complained of herein there was an oral contract existing between Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company made four or five years prior thereto and extending so long as said Oklahoma Gas and Electric Company should operate [fol. 73] its distribution system and purchase gas from said Oklahoma Natural Gas Company, providing that as to consumers of gas within the city gates or measuring stations so situated as said Wilson & Company, Inc., with reference

to Oklahoma City, said city gates and the respective properties of Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, that such consumers would be supplied and furnished gas by the Oklahoma Gas and Electric Company and would not be furnished and supplied gas by the Oklahoma Natural Gas Company.

### III

Prior to 1924 such gas as was used by Wilson & Company, Inc., was purchased from the Oklahoma Gas and Electric Company and delivered through a line extending from the measuring stations located at Reno and Pennsylvania and Thirty-sixth and Santa Fe. When Wilson & Company, Inc., resumed the use of gas for fuel in 1924, it was found that such line was not in good condition, and in order to save the expense of replacing it, the arrangement was made as set out in the last paragraph of finding I-(2). A verbal agreement was made that the Oklahoma Gas and Electric Company should purchase the portion of the emergency line west of the new measuring station and now covered by the purchase of April 3, 1925, if a price could be later agreed upon.

### IV

The Oklahoma Natural Gas Company has not served, nor professed to serve, gas to consumers upon the lines of the Oklahoma Gas and Electric Company located within the city gates, that is, beyond the point where the gas sold by the Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company is measured. The Oklahoma Natural Gas Company sold no gas to Wilson & Company, Inc., prior to the order complained of.

### V

There was no contract between the Oklahoma Gas and Electric Company and Wilson & Company, Inc., to furnish gas for any particular period in the future, but if the order complained of had not been made, it could reasonably be expected that Wilson & Company, Inc., would have continued to purchase gas from the Oklahoma Gas and Electric Company at a profit to it of approximately five cents a thousand cubic feet.

[fol. 74]

## VI

The rates charged by the Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company for gas delivered to it, and the rates charged by the Oklahoma Gas and Electric Company to Wilson & Company, Inc., were those prescribed by the Corporation Commission of Oklahoma.

## VII

The order herein sought to be enjoined became inoperative on March 1, 1928, (while the petition to review was pending in the Supreme Court), when the properties of the Oklahoma Gas and Electric Company were purchased by the Oklahoma Natural Gas Corporation, and new industrial rates were put into effect. There is no suggestion in the record of any intention on the part of any of the public officials of Oklahoma to undertake to impose any statutory penalties for failure to comply with the order while it was in effect. No such statutory penalties could be imposed because the order was legally superseded until it was displaced by the new rates. The only consumer affected by the order is Wilson & Company, Inc.

## VIII

Both the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company petitioned the Supreme Court of Oklahoma for a review of the order of April 13, 1926, and pending such review, the order was superseded as provided by the statutes of Oklahoma. Such review by the Supreme Court was legislative and not judicial. On April 29, 1930, the Supreme Court of Oklahoma affirmed the order of the Corporation Commission.

## IX

On December 3, 1931, Wilson & Company, Inc., brought an action at law in the District Court of Oklahoma County, Oklahoma, against the Oklahoma Gas and Electric Company and the Fidelity & Casualty Company of New York upon bonds given to supersede the order of the Corporation Commission pending review, and upon an alleged oral agreement of the Oklahoma Gas and Electric Company to repay to Wilson & Company, Inc., any sums collected in excess



of those which would have been payable if the order had not been superseded. In its answer in that case, the Oklahoma Gas and Electric Company alleged (a) that the order [fol. 75] of the Corporation Commission was legislative in character, as was the decision of the Supreme Court of Oklahoma affirming the same, and that under the Constitution and Laws of the United States, the defendant had the right to have a judicial decision of the court upon both the law and the facts affecting the validity of said order; and (b) that the order was null and void for substantially the same reasons as set out in the bill filed in this action. There was a four day trial in the state court, on the issues so joined, and on April 5, 1933, judgment was entered by that court in favor of the plaintiff. Findings of the evidentiary facts, substantially as stipulated by the parties herein, were made by that court. The court concluded as a matter of law that it had jurisdiction and that it was its duty to determine judicially the validity of the order of the Corporation Commission now under attack.

It thus appears, and we find, that the validity of such order has been judicially determined by the District Court of Oklahoma County, Oklahoma. An appeal from said judgment to the Supreme Court of Oklahoma has been perfected, and the judgment superseded pending such appeal.

## CONCLUSIONS OF LAW

### I

The order under attack having been lawfully superseded pending a legislative review by the Supreme Court, neither of the plaintiffs is subject to any penalties prescribed by statute for violation of the order while it was so superseded. There is no evidence that the state officials, defendants herein, have threatened, or intend, to undertake to subject the plaintiffs to any of such penalties. There is, therefore, no ground for injunctive relief against the state officials.

### II

The only liability to which the plaintiffs, or either of them, may now be subjected, on account of such order is the repayment to a single consumer, Wilson & Company, Inc., of the excess amounts collected by the Oklahoma Gas and Electric Company over the rates prescribed by such

order. Such possible liability attaches only to the Oklahoma Gas and Electric Company, which collected and retained such excess amounts.

[fol. 76]

### III

The validity of the order may be and has been interposed as a defense to an action at law to recover such excess amounts. There is, therefore, an adequate remedy at law.

George T. McDermott, United States Circuit Judge.

F. E. Kennamer, United States District Judge. Edgar S. Vaught, United States District Judge.

#### IN UNITED STATES DISTRICT COURT

Before McDermott, Circuit Judge, and Kennamer and Vaught, District Judges

OPINION—Filed September 22, 1933

McDERMOTT, Circuit Judge, delivered the opinion of the court:

At the bottom of this controversy is the question of whether an order made by the Corporation Commission of Oklahoma in 1926, requiring the Oklahoma Natural Gas Company to serve Wilson & Company, Inc., with gas, is valid. The validity of the order, in turn, depends upon the question of whether the Oklahoma Natural Gas Company had professed or undertaken to serve Wilson & Company, Inc., or others similarly situated. The parties agree, and the law undoubtedly is, that no power resides in the state to compel a utility to furnish service to that part of the public which it has not professed or undertaken to serve. The controversy narrows to the question of whether the Oklahoma Natural Gas Company had undertaken to serve others of the public situated similarly to Wilson & Company, Inc. While the order of the Commission, sustained by the Supreme Court of Oklahoma acting in its legislative capacity, is presumptively correct, the plaintiffs are entitled to a judicial review of both the facts and the law on this constitutional question.

The defendants contend that we are precluded from a review of that order because the question has become moot.

We do not agree. It is true that the order has been displaced by other rate orders, and is not presently effective. [fol. 77] It is likewise true that the order was displaced prior to the affirmance thereof by the Supreme Court of Oklahoma, and that it was lawfully superseded pending such review. The plaintiffs are therefore not subject to any of the penal provisions of the Oklahoma statutes for violating a valid order, and there is no threat by the state officials of any effort to impose such penalties. There is, therefore, no basis for any injunctive relief against the state officials. *Ex Parte La Prade*, 289 U. S. 444, 458. However, one of the defendants, Wilson & Company, Inc., is vigorously asserting rights predicated upon the validity of such order. While this is the only spark of life left in the order, the controversy cannot be said to be moot as long as it remains unextinguished. *Oklahoma Operating Company v. Love*, 252 U. S. 331.

But this action in equity cannot be maintained if there is an adequate remedy at law. Sec. 267, Jud. Code, 28 U. S. C. A. § 384; *Mathews v. Rodgers*, 284 U. S. 521.

It seems apparent that the plaintiffs herein are afforded complete protection by the defense in the action at law. It was suggested, upon argument, that the legal defense was not adequate because under the constitution of Oklahoma, the state district court had no jurisdiction judicially to determine the validity of the order. The state district court has ruled otherwise, and has judicially determined the validity of the order. The plaintiffs are entitled, in some court, to a judicial determination of the validity of the order. It has had that determination, and there is no reason to believe that it will be denied a judicial review by the Supreme Court of Oklahoma.

The Oklahoma Gas & Electric Company, being entitled to and having interposed the invalidity of the order in defense of the action at law, has no ground for asking equity again to pass upon its validity. While the Oklahoma Natural Gas Company is a party plaintiff in this case, and is not a party defendant in the state court suit, the record conclusively demonstrates that it has no substantial interest in the controversy.

It is said that equity may proceed, even if an order has been vacated, if it appears that its vacation was to avoid a judicial determination of its validity; or if a multiplicity of

suits by consumers may follow notwithstanding its vacation. This may be conceded; but no such situation is present here. To enjoin the continuance of a single action at law is the only [fol. 78] thing sought to be accomplished by this equitable action. We are reminded that equity may proceed to adjudicate a controversy, notwithstanding that the specific relief sought has been frustrated by the acts of the parties pendente lite. True enough, but here the defendant took no step to frustrate the action of this court; having first commenced an action at law to recover excess payments made to the Oklahoma Gas and Electric Company, and this court having declined to enjoin the prosecution of that suit, it proceeded to judgment in an orderly way. The force of that judgment cannot be impaired by the mere pendency of an action to enjoin the prosecution.

Considerations of comity support the conclusion reached. The action in the state court to enforce the order was brought prior to the present action in this court to enjoin its enforcement. Both actions were in personam, and could and did proceed concurrently. In due course, the action in the state court proceeded to a trial lasting for several days. It has rendered its considered judgment, and the matter is now pending before the Supreme Court of Oklahoma. The evidentiary facts, as found by that court, are substantially as stipulated by counsel herein. The question will ultimately be decided by the Supreme Court of the United States, either on appeal from this court or from the Supreme Court of Oklahoma. Since the state court case has gone to judgment, the only effective order which this court could make if it reached a conclusion contrary to that court, would be to enjoin the enforcement of that judgment and any further proceedings in that court. The more orderly procedure is for the plaintiffs to review the correctness of that judgment in the Supreme Court of Oklahoma, and if then dissatisfied, to invoke the jurisdiction of the Supreme Court of the United States.

The bill will be dismissed at the costs of the plaintiffs.

September 22, 1933.

Geo. T. McDermott, United States Circuit Judge;  
F. E. Kennamer, United States District Judge;  
Edgar S. Vaught, United States District Judge.



## PETITION FOR REHEARING—Filed October 6, 1933

Come now the complainants and move the court to rehear and reconsider its findings and decision herein, for the reasons herein set forth.

As we understand the holding herein, it is based principally upon the fact that the Oklahoma Packing Company had brought its action against the Oklahoma Gas & Electric Company, arising out of and based upon the order of the Corporation Commission, in the state court and had already obtained judgment in the state court for a sum of money against the Oklahoma Gas & Electric Company and its surety; that the Oklahoma Gas & Electric Company had defended in the state court action, among other grounds, upon the ground of the invalidity of the order of the Corporation Commission, such ground of invalidity thereof set forth in said defense in the state court case being the same or substantially the same as the ground of invalidity thereof set forth in this action, from which situation, as we understand it, this court concludes that there was an adequate remedy at law and such remedy still continues by reason of the appeal to the Supreme Court of the state from said state court judgment. We believe the court overlooked the fact that the adequate remedy at law which will defeat the equity jurisdiction of the federal court is an adequate remedy at law on the law side of the federal court and not in some other court.

This court as a federal equity court has jurisdiction to enjoin proceedings in the state court to enforce local statutes which are repugnant to the Constitution of the United States.

Ex Parte Young, 209 U. S. 123. Truax v. Raich, 239 U. S. 33. Missouri v. C. B. & Q. R. R. Co., 241 U. S. 533. Terrace v. Thompson, 263 U. S. 197.

Regulations made under the authority of a state enactment are state statutes within the contemplation of the above cases.

Smith v. Ames, 169 U. S. 466. Prentiss v. Atlantic Coast Line Co., 211 U. S. 210.

A suit by a customer to recover what he claims he is entitled to arising out of the Commission's order is an enforcement of the order of the Commission as much so and of equal

force as the enforcement of penalties for violation of the [fol. 80] order. Such is the holding in the case of Oklahoma Operating Company v. Love, 252 U. S. 331 at page 337-338, as follows:

"The suit should, therefore, proceed for the purpose of determining whether the maximum rates fixed by the Commission are, under present conditions, confiscatory. If they are found to be so, a permanent injunction should issue to restrain their enforcement as through an assertion by customers of alleged rights arising out of the Commission's orders."

It is, of course, well settled that the remedy at law which will defeat the federal court's equity jurisdiction must be an adequate remedy at law on the law side of the federal court. In Risty v. C. R. I. & P. Ry. Co., 270 U. S. 378, at page 388, the court says:

"The remedy by appeal to the state court under Section 8469 does not appear to be coextensive with the relief which equity may give. In any event, it is not one which may be availed of at law in the federal courts, and the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts."

There was and is no possible action which the complainants here could have brought on the law side of the federal court to test out this matter. The suit in the state court was brought by the Oklahoma Packing Company, formerly Wilson & Company, against the Oklahoma Gas & Electric Company and the surety upon its bond, which was a surety corporation. The Oklahoma Gas & Electric Company is a domestic corporation organized and existing under and by virtue of the laws of the State of Oklahoma. The Surety Company was a foreign corporation, but it was merely a surety upon the bond of the Oklahoma Gas & Electric Company and, of course, as to it there existed no separable controversy. Said Oklahoma Gas & Electric Company and said surety company were the only two defendants in the state court action. Therefore, it was impossible for the state court case to be removed to the federal court so as to have a hearing or a remedy on the law side of the federal court docket.

Under the cases first cited this court has jurisdiction to [fol. 81] enjoin said proceeding in the state court as such

proceeding in the state court was to enforce a statute which complainants in this court allege is repugnant to the Constitution of the United States, that is the 14th Amendment thereof. Thus the jurisdiction of this court is clear. The complainants here do not have, and never had any possible way to litigate this matter upon the law side of the federal court. Therefore complainants here have no adequate remedy at law at all as such term and expression is used and understood in the federal court decision.

The legislative action of the state having become complete with the affirmance by the Supreme Court of the State of the order of the Corporation Commission, the complainants had and have a constitutional right to their choice of courts and to exercise their choice of seeking a review of the validity of said order in the federal courts. Complainants exercised their constitutional choice by the institution of this action.

Kansas City Southern Ry. Co. v. Cornish, et al., 65 Fed. (2) 671.

In *Willecox v. Consolidated Gas Company*, 212 U. S. 19, at pages 39 and 40 the court says:

"At the outset it seems to us proper to notice the views regarding the action of the court below, which have been stated by counsel for the appellants, the Public Service Commission, in their brief in this court. They assume to criticise that court for taking jurisdiction of this case, as precipitate, as if it were a question of discretion or comity, whether or not that court should have heard the case. On the contrary, there was no discretion or comity about it. When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (*Cohens v. Virginia*, 6 Wheat. 264, 404), and in taking it that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved which by law brings the case within the jurisdiction of a federal court. The right of a party plaintiff to choose a federal court where there is a choice cannot be properly denied. In *re Metropolitan Rail- [fol 82] way Receivership*, 208 U. S. 90-116; *Prentiss v. Atlantic Coast Line et al.*, 211 U. S. 210."

Respectfully submitted, Rainey, Flynn, Green & Anderson, Allen, Underwood & Canterbury, R. M. Campbell. Attorneys for Complainants.

## IN UNITED STATES DISTRICT COURT

Before McDermott, Circuit Judge, and Kennamer and  
Vaught, District Judges

OPINION ON PETITION FOR REHEARING—Filed October 12, 1933

Per CURIAM:

The petition for rehearing presents the proposition that since the plaintiff could not remove the action at law in the State court, *Great Northern Ry. Co. v. Alexander*, 246 U. S. 276, the Federal courts should enjoin its prosecution since the defendant therein raised a federal question by its answer. This is a startling suggestion to which we cannot accede. Since the decision in *Tennessee v. Union Planters Bank*, 152 U. S. 454, construing the removal act of August 13, 1888 (25 Stat. 433), it has been uniformly held that a cause may not be removed because a defendant pleads a federal question in its answer. Plaintiff now says that while such a suit may not be removed to the Federal court, a Federal court should enjoin its prosecution. That is to circumvent the law as to removal, to deny the plaintiff in the state court action his right to proceed in the state courts, and is not supported by any authority cited. It would increase immeasurably the jurisdiction of the Federal courts if every defendant asserting a Federal question by way of defense in a state court, might enjoin proceedings in that court.

The claim is predicated upon a statement in *Risty v. C. R. I. & P. Ry. Co.*, 270 U. S. 378, that equity has jurisdiction unless there is an adequate remedy at law in the Federal courts. That such statement was not intended to have such far-reaching consequences as contended for, is made clear [fol. 83] by the recent statement of the Supreme Court in *Matthews v. Rodgers*, 284 U. S. 531, 526, that

"If the remedy at law is plain, adequate and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this court for review if any federal question be involved. Jud. Code § 237, or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present."

*Ex Parte Young*, 209 U. S. 123, and cases which follow it, are bottomed upon the proposition that, because of the severity of the penalties or the multiplicity of threatened actions,



the remedy by way of a defense in the state court is not adequate. No such situation is here presented.

The petition for rehearing is denied.

IN UNITED STATES DISTRICT COURT

ORDER DISMISSING BILL OF COMPLAINT—Filed December 12, 1933

And now, to-wit, on this 15th day of November, 1933, this cause having heretofore come on for final hearing upon bill, answer and proofs, the evidence of both parties having been presented in open court, and the cause having been fully argued by counsel, and this court having rendered its written opinion, as well as findings of fact and conclusions of law, and being of the opinion that the said bill of complaint should be dismissed for want of equity, as set forth in said written opinion, and the complainants, on the 6th day of October, 1933, having filed their petition for rehearing and the same having been overruled by this Court on the 12th day of October, 1933;

It Is Ordered, Adjudged and Decreed by the Court that the bill of complaint herein be and it hereby is dismissed for want of equity, with costs to the complainants, to all of which the complainants, and each of them, excepted, and said exceptions are by the Court allowed.

Geo. T. McDermott, United States Circuit Judge. F.

E. Kennamer, United States District Judge. Edgar

S. Vaught, United States District Judge.

[fol. 84] IN UNITED STATES DISTRICT COURT

MANDATE OF SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA ss:

(Seal.)

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Western District of Oklahoma, Greeting:

Whereas, lately in the District Court of the United States for the Western District of Oklahoma, before you, or some of you, in a cause between Oklahoma Gas & Electric Com-

pany, Oklahoma Natural Gas Company, W. T. Phillips, Jr., et al., etc., Complainants, and Oklahoma Packing Company, formerly Wilson & Co., Inc., of Oklahoma; Wilson & Company, Inc., et al., Defendants, No. 1357 Equity, wherein the decree or order of the said District Court dismissing the bill of complaint, was duly entered in said cause on the 12th day of December, A. D. 1933, which decree is fully set out in the record of said cause in the office of the clerk of said District Court and is incorporated herein by reference thereto; as by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-three, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court, in this cause be, and the same is hereby, vacated, costs to be taxed against the appellants.

And It Is Further Ordered that this cause be, and the same is hereby, remanded to the said District Court for further proceedings to be taken independently of Sec. 266 of the Judicial Code.

May 21, 1934

You, therefore are hereby commanded that such execution and further proceedings be had in such cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

[fol. 85] Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the sixteenth day of June, in the year of our Lord one thousand nine hundred and thirty-four.

Costs of Okla. Packing Co. et al.:

Clerk \$)

) Paid

Printing record \$)

Charles Elmore Cropley, Clerk of the Supreme Court  
of the United States, by Hugh W. Barr, Deputy.

Endorsed: File No. 1357—In Equity. Supreme Court of the United States No. 832—, October Term, 1933. Oklahoma Gas and Electric Company, Oklahoma Natural Gas Company, W. T. Phillips, Jr., et al., etc., vs. Oklahoma Packing Company, formerly Wilson & Co., Inc. of Oklahoma, Wilson & Co., Inc. of Oklahoma, et al. Filed June 19, 1934. Theodore M. Filson, Clerk. Mandate.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY

(Final Hearing, January 3, 1935)

(Before Judge Vaught)

On this 3rd day of January, 1935, parties appear by their respective counsel and this cause comes on for final hearing. The plaintiff asks and is granted leave to amend bill of complaint over the objection of the defendants, and exception is allowed the defendants. The defendants ask for twenty (20) days in which to answer or plead to the bill as amended, which leave is denied and exceptions allowed the defendants. It is thereupon ordered that motion of the Corporation Commission to dismiss cause and objection of the defendants to further proceedings be submitted to the court for determination. Plaintiffs ask and are granted leave to file motion to substitute corporation commission members as parties defendant over the objection of the defendants, and exception is allowed the defendants. The defendants thereupon move for separate trial as to the newly made defendant corporation commission members, which motion is overruled and exceptions allowed the defendants. The plaintiffs present evidence and proof and rest, and thereafter the defendants present their evidence and proof and rest, and said cause is submitted to [fol. 86] the court for determination on briefs. The complainants are granted ten days in which to file brief, the defendants are granted to February 10, 1935, to file answer brief, and the complainants are granted to February 20, 1935, to file reply brief, and parties are granted leave to argue cause at a later date.

## IN UNITED STATES DISTRICT COURT

AMENDMENT TO COMPLAINT—Filed January 3, 1935

Come now the complainants, leave of court having been first obtained, and amend the last paragraph of Section 8 of their bill of complaint herein by inserting after the word "that" and before the word "Wilson," "under the Constitution of Oklahoma as construed by the Supreme Court of Oklahoma, the highest Court of said State, neither the District Court of Oklahoma County, Oklahoma, nor the Supreme Court of Oklahoma on appeal from the judgment of said Court in the aforesaid action may review or annul said order of the Commission herein complained of and for the further reason that \* \* \*"

Rainey, Flynn, Green & Anderson, Allen, Underwood & Canterbury, Attorneys for Complainants.

## IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS AND OBJECTION TO FURTHER PROCEEDINGS  
IN THIS CAUSE—Filed Jan. 3, 1935

Comes now The Corporation Commission of the State of Oklahoma, Paul Walker, Chairman, C. C. Childers and E. R. Hughes, members of said Commission, and J. Berry King, Attorney General of the State of Oklahoma, defendants in the above cause, and respectfully ask the Court to dismiss this cause of action as against them, and each of them, and to take no further action against said defendants in this case, for the following reasons, to-wit:

## I

The State of Oklahoma has not consented to be sued in the United States District Court for the Western District of Oklahoma.

[fol. 87]

## II

For the reason that the injunctive relief herein sought against these defendants cannot be obtained by an order from a single United States District Judge since Section 266, U. S. Judicial Code, provides that such relief by in-



junction as is sought here against state officers can be had only from a three judge court.

### III

For the reason that Paul Walker and C. C. Childers, former members of the Corporation Commission of the State of Oklahoma, against whom injunction is sought, are not now members of said Corporation Commission of the State of Oklahoma and upon their retirement from office this sought-for injunction as against them and each of them abated.

### IV

The opinion of the Supreme Court of the United States, rendered in May, 1934, in the appeal of this case, held: "That there was never any basis for relief of any sort against the state officers."

J. Berry King, Attorney General of Oklahoma; Fred Hansen, Asst. Atty. General of Oklahoma, Attorneys for the Defendants, The Corporation Commission of the State of Oklahoma, Paul Walker, Chairman, C. C. Childers and E. R. Hughes, Members of said Commission, and J. Berry King, Attorney General of the State of Oklahoma.

## IN UNITED STATES DISTRICT COURT

**Findings of Fact and Conclusions of Law**—Filed July 30, 1937

### FINDINGS OF FACT

#### I

The court makes the following findings of fact in accord with the written stipulation of the parties:

#### (1)

At all the times mentioned in complainants' petition the [fol. 88] Oklahoma Natural Gas Company was a corporation engaged in the business of the production of, transportation and sale of natural gas as a public utility, sup-

plying gas at various towns and cities in Oklahoma for domestic and industrial consumption. It held franchises for local distribution in a few towns and cities, but none in Oklahoma City.

Wilson & Company, Inc., is a corporation operating a manufacturing plant situated in Oklahoma City southwest of and outside the corporate limits of the city of Oklahoma City. The Oklahoma Gas and Electric Company is a corporation, at all the times herein involved, engaged in the distribution of gas in Oklahoma City to domestic and industrial consumers in Oklahoma City and immediate vicinity, and operating under a franchise from the city. Prior to the promulgation by the Corporation Commission of what is known as the gate rate order in June, 1921, the Oklahoma Natural Gas Company was supplying the Oklahoma Gas and Electric Company with natural gas at Oklahoma City under contracts and arrangements on the percentage basis.

(2)

That at the time of making said gate rate order, and for some time prior thereto, there were only two reducing stations at, or through which the gas was reduced from high pressure to low pressure and delivered by said Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company, one of such stations being located at Pennsylvania and Reno Avenues, and the other being located at Thirty-Sixth Street and Santa Fe Avenue, both of which stations were then outside the city limits of Oklahoma City, both of same being northerly or north of the city. All of the gas passing through the reducing station at Thirty-Sixth Street and Santa Fe Avenue was gas from the north of Oklahoma City produced in the fields known as the Cushing, Kellyville, Depew and other fields in that general locality, which points are north and east of Oklahoma City, and was transmitted by the pipe lines of the Oklahoma Natural Gas Company. During the year 1919, the Oklahoma Natural Gas Company built a transmission line to the gas field known as the Chickasha field near Chickasha, Oklahoma, southwest of Oklahoma City, and said line extended from said Chickasha field to Independence Avenue in Oklahoma City and thence proceeded north on said Independence Avenue nearly a mile west of the packing plant [fol. 89] of Wilson & Company, Inc., extending on to Reno

Avenue, thence east on that avenue to the reducing station at Pennsylvania and Reno, said Reno Avenue being something over a mile north of said packing plant. The Oklahoma Natural Gas Company in 1921, constructed a six-inch gas line connected with its system and extending east and west through Ash Avenue west of Oklahoma City, and located about five or six hundred feet south of the engineroom of Wilson & Company, Inc.; said gas line in Ash Street extended 1500 feet east of Wilson & Company, Inc.'s plant, and connected with a meter or measuring station located at or immediately adjacent to the intersection of Hickory Street and Agnew Street, and within 200 feet of the city limits of the City of Oklahoma City; this gas line was constructed for use in such emergency as might arise by the washing out at the river crossings of its line on Independence Avenue; the said measuring station located at or near the intersection of Hickory Street and Agnew Street, remained in this location throughout the month of September, 1924, and for some time thereafter; in September, 1924, Agnew Street was, and still is, the city limits of Oklahoma City; the plant of Wilson & Company, Inc., of Oklahoma, was in September, 1924, and now is, located immediately west of the intersection of Agnew and Hickory Streets, and approximately 1500 feet outside the city limits of Oklahoma City.

The complainant, Oklahoma Gas and Electric Company, desired to serve gas to Wilson & Company, Inc., for fuel purposes and made an arrangement or agreement with the Oklahoma Natural Gas Company in 1924 at some date following the month of September to move its measuring station or meter from its location at or near the intersection of Agnew and Hickory Street, to some point west of the plant of Wilson & Company, Inc., of Oklahoma, and the said measuring station was finally located at or near the intersection of Ash and May Avenues, approximately one-third of a mile west of Wilson & Company, Inc.'s plant, and approximately 3000 feet west of Agnew Street, the city limits of Oklahoma City. It was at first understood between the Oklahoma Natural Gas Company and the Oklahoma Gas and Electric Company that the measuring station should be located just south of the Wilson & Company, Inc., plant at the point where Wilson & Company, Inc., were to be served and the Oklahoma Gas and Electric Company on April 3, 1925, purchased that [fol. 90] part of the Oklahoma Natural Gas Company's line

between such point and the measuring station at Hickory Street. The Oklahoma Gas and Electric Company constructed a service line extending from the main on Ash Avenue, to the boilerroom of Wilson & Company, Inc., and the necessary meters and measuring devices a distance of about 450 feet.

(3).

Prior to the making of the gate rate order in 1921, the Oklahoma Gas and Electric Company had been supplying gas to users at Oklahoma City, both within and without the city limits. When the gate rate order was made and the Oklahoma Natural Gas Company was required to put in gates and measures, sell and deliver the gas to the Oklahoma Gas and Electric Company at said gates, there were several consumers of gas outside of and beyond the location of the gate stations, who had been supplied by the Oklahoma Gas and Electric Company, and in carrying out said order, it was agreed between the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company, with the assent of the Corporation Commission that the Oklahoma Natural Gas Company could, if it desired, continue to supply gas to such consumers outside the gate, and all or some of them were continued to be so supplied after said gate order by the Oklahoma Natural Gas Company. During 1924, 1925, 1926, the Oklahoma Natural Gas Company served gas to Lorris E. Cobb, R. S. Schuneman and Billie Gregg, outside of the city limits and outside the measuring stations. However, each of them consumed less than one hundred thousand cubic feet per month. No other consumers, except Billie Gregg, were furnished gas by the Oklahoma Natural Gas Company outside the said gates, except consumers over whose land its pipe line was laid, and except certain domestic customers who were outside the city gates or measuring stations on the lines of the Oklahoma Natural Gas Company and were being served by the Oklahoma Gas and Electric Company at the time of the gate rate order. The Oklahoma Natural Gas Company never served consumers inside of the gates whose gas had been measured and charged to the distributing company. It had no desire to furnish any gas in competition with its biggest customer, the Oklahoma Gas and Electric Company, who was purchasing all its gas from the Oklahoma Natural Gas Company.



In September, 1924, the Oklahoma Natural Gas Company made its application to the Corporation Commission of the State of Oklahoma, to establish a reduction in rates for gas for industrial purposes; the Corporation Commission acted upon its application and by Journal Entry No. 1203, in Cause No. 6030, authorized the Oklahoma Natural Gas Company to establish rates for industrial gas at thirty-eight cents per thousand cubic feet, for the first one hundred thousand cubic feet, per month, and fifteen cents per thousand cubic feet, for all gas in excess of the first one hundred thousand cubic feet, per month, provided there was a minimum consumption of thirty million cubic feet per month, per customer; said rates were to apply to consumers located outside of the city limits of the cities served by the Oklahoma Natural Gas Company; the Corporation Commission did, by the Journal Entry No. 3276, in Cause No. 5965, authorize the Oklahoma Natural Gas Company to reduce its rates to thirty-five cents per thousand cubic feet for the first one hundred thousand cubic feet, per month, and fifteen cents per thousand cubic feet, for all in excess of the first one hundred thousand cubic feet, per month, where the consumer used a minimum of fifteen million cubic feet per month; said rate became effective on January 1, 1926; it is admitted that the Oklahoma Natural Gas Company did, from and after January 1, 1926, furnish gas to Producers & Refiners Corporation, located immediately outside of Tulsa, Oklahoma, at the rate of thirty-five cents per thousand cubic feet, for the first one hundred thousand cubic feet, per month, and fifteen cents per thousand cubic feet for all over one hundred thousand cubic feet; that the consumption of the Producers & Refiners Corporation during the months of January, to and including the month of September, 1926, was from 45,898,000 cubic feet, to 65,287,000 cubic feet. Also, the Oklahoma Natural Gas Company furnished industrial gas to several other industrial users at Sapulpa and Tulsa. The Oklahoma Natural Gas Company had franchises and owned and operated the gas distribution systems in the cities of Sapulpa and Tulsa during all of the times herein involved.

In December, 1924, the Oklahoma Gas and Electric Company began serving gas to Wilson & Company, Inc., and

built a service line from the six-inch line in Ash Street to [fol. 92] Wilson & Company, Inc.'s boilers. April 13, 1926, upon complaint of Wilson & Company, Inc., the Corporation Commission promulgated its Order No. 3388, which order required the Oklahoma Natural Gas Company to serve Wilson & Company, Inc., with gas at its industrial rate. Both the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company appealed to the Supreme Court and the Oklahoma Gas and Electric Company gave bond to supersede the execution of the order and supersedeas was ordered upon filing and approving bonds.

## (6)

In the month of September, 1926, the Oklahoma Natural Gas Corporation purchased the natural gas system of Oklahoma Natural Gas Company and continued thereafter to operate the transmission and distribution systems in Oklahoma. As of March 1, 1928, the Oklahoma Natural Gas Corporation purchased the natural gas distributing systems of the Oklahoma Gas and Electric Company in the various cities and towns in Oklahoma, including Oklahoma City, and thereafter operated said distributing systems in said cities and towns. The Oklahoma Natural Gas Corporation concurrently, with the commencement of its operations of the gas distributing systems in said cities and towns previously owned and operated by Oklahoma Gas and Electric Company, placed in effect in said cities and towns its industrial gas rates that had theretofore been effective in other cities and towns, and on the general system owned and operated by Oklahoma Natural Gas Corporation. The Oklahoma Natural Gas Corporation after March 1, 1928, furnished gas to Wilson & Company, Inc., for boiler fuel purposes at its established rate of thirty-five cents for the first one hundred thousand cubic feet per month, and fifteen cents per thousand cubic feet, for all in excess thereof, during the months that the total consumption exceeded fifteen million cubic feet.

## (7)

It is agreed that Billie Gregg's place where the Oklahoma Natural Gas Company served gas after the gate rate order was located outside and beyond the city measuring stations and was approximately three miles north of Wilson & Company, Inc.'s plant and approximately a mile west of the city limits of Oklahoma City.

[fol. 93]

(8)

It is agreed that gas was furnished by Oklahoma Natural Gas Company to Oklahoma Gas and Electric Company through the measuring station located near the intersection of Hickory and Agnew Streets in the following quantities and during the following months, to-wit:

January, 1922	563,000 cubic feet
October, 1923	3,467,000 cubic feet
November, 1923	7,879,000 cubic feet

and that no other gas was measured through said measuring station from the date of its construction up to the date of its discontinuance. It is agreed that the first gas was metered through the measuring station constructed at Ash Street and May Avenue by Oklahoma Natural Gas Company to Oklahoma Gas and Electric Company in the month of December, 1924. Wilson & Company, Inc., intermittently purchased gas from the Oklahoma Gas and Electric Company for use for fuel under its boilers from the year 1916 or 1917, but did not purchase from the Oklahoma Gas and Electric Company, or use gas as fuel for its boilers, from the 14th day of May, 1923, until it commenced again in December, 1924. It is agreed, however, that from the date of the gate rate order in the year 1921, at or about which time the measuring stations were installed, Wilson & Company, Inc., purchased gas for miscellaneous incidental purposes at its plant from the Oklahoma Gas and Electric Company during each and every month up until December, 1924, and during some of said months purchased additional supplies of gas for fuel under its boiler plant.

## II

The court finds in accord with paragraph seven of the bill, admitted by paragraph seventeen of the answer, that prior to and at the time of the making of the order complained of herein there was an oral contract existing between Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company made four or five years prior thereto and extending so long as said Oklahoma Gas and Electric Company should operate its distribution system and purchase gas from said Oklahoma Natural Gas Company, providing that as to consumers of gas within the city gates or measuring stations so situated as said Wilson & Company, Inc.,

with reference to Oklahoma City; said city gates and the respective properties of Oklahoma Gas and Electric Company [fol. 94] and Oklahoma Natural Gas Company, that such consumers would be supplied and furnished gas by the Oklahoma Gas and Electric Company and would not be furnished and supplied gas by the Oklahoma Natural Gas Company.

### III

Prior to 1924 such gas as was used by Wilson & Company, Inc., was purchased from the Oklahoma Gas and Electric Company and delivered through a line extending from the measuring stations located at Reno and Pennsylvania and Thirty-sixth and Santa Fe. When Wilson & Company, Inc., resumed the use of gas for fuel in 1924, it was found that such line was not in good condition, and in order to save the expense of replacing it, the arrangement was made as set out in the last paragraph of finding I-(2). A verbal agreement was made that the Oklahoma Gas and Electric Company should purchase the portion of the emergency line west of the new measuring station and not covered by the purchase of April 3, 1925, if a price could be later agreed upon.

### IV

The Oklahoma Natural Gas Company has not served, nor professed to serve, gas to consumers upon the lines of the Oklahoma Gas and Electric Company located within the city gates, that is, beyond the point where the gas sold by the Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company is measured. The Oklahoma Natural Gas Company sold no gas to Wilson & Company, Inc., prior to the order complained of.

### V

There was no contract between the Oklahoma Gas and Electric Company and Wilson & Company, Inc., to furnish gas for any particular period in the future, but if the order complained of had not been made, it could reasonably be expected that Wilson & Company, Inc., would have continued to purchase gas from the Oklahoma Gas and Electric Company at a profit to it of approximately five cents a thousand cubic feet.



## VI

The rates charged by the Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company for gas delivered to it, and the rates charged by the Oklahoma Gas [fol. 95] and Electric Company to Wilson & Company, Inc., were those prescribed by the Corporation Commission of Oklahoma.

## VII

The order herein sought to be enjoined became inoperative on March 1, 1928 (while the petition to review was pending in the Supreme Court), when the properties of the Oklahoma Gas and Electric Company were purchased by the Oklahoma Natural Gas Corporation, and new industrial rates were put into effect. There is no suggestion in the record of any intention on the part of any of the public officials of Oklahoma to undertake to impose any statutory penalties for failure to comply with the order while it was in effect. No such statutory penalties could be imposed because the order was legally superseded until it was displaced by the new rates. The only consumer affected by the order is Wilson & Company, Inc.

## VIII

Both the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company petitioned the Supreme Court of Oklahoma for a review of the order of April 13, 1926, and pending such review, the order was superseded as provided by the statutes of Oklahoma. Such review by the Supreme Court was legislative and not judicial. On April 29, 1930, the Supreme Court of Oklahoma affirmed the order of the Corporation Commission.

## IX

On December 3, 1931, Wilson & Company, Inc., brought an action at law in the District Court of Oklahoma County, Oklahoma, against the Oklahoma Gas and Electric Company and the Fidelity & Casualty Company of New York, upon bonds given to supersede the order of the Corporation Commission pending review, and upon an alleged oral agreement of the Oklahoma Gas and Electric Company to repay to Wilson & Company, Inc., any sums collected in excess of those which would have been payable if the order

had not been superseded. In its answer in that case, the Oklahoma Gas and Electric Company alleged (a) that the order of the Corporation Commission was legislative in character, as was the decision of the Supreme Court of Oklahoma affirming the same, and that under the Constitution and laws of the United States, the defendant had the right to have a judicial decision of the court upon both the law and the facts affecting the validity of said order; and [fol. 96] (b) that the order was null and void for substantially the same reasons as set out in the bill filed in this action. There was a four day trial in the state court, on the issues so joined, and on April 5, 1923, judgment was entered by the court in favor of the plaintiff. Findings of the evidentiary facts, substantially as stipulated by the parties herein, were made by that court. The court concluded as a matter of law that it had jurisdiction and that it was its duty to determine judicially the validity of the order of the Corporation Commission now under attack.

An appeal from said judgment to the Supreme Court of Oklahoma was perfected, the judgment superseded pending such appeal, and on the 15th day of September, 1936, the Supreme Court of Oklahoma reversed the decision and judgment of the District Court of Oklahoma County, and held that said court had no jurisdiction to proceed in the matter until this suit in equity was disposed of by this court. Oklahoma Gas and Electric Co. v. Wilson & Co., 63 Pac. (2d) 703.

## X

Prior to the commencement of this action Wilson & Company, Inc., of Oklahoma, a Delaware corporation, qualified, as provided under the statutes of the State of Oklahoma, to do a local business as a foreign corporation in the State of Oklahoma and at the time of and prior to such institution of this action was so doing a local business in Oklahoma County, Oklahoma. In connection with such qualification and as provided by the statutes of the State of Oklahoma said foreign corporation duly executed in writing and filed with the proper officers of the State of Oklahoma an appointment of an agent upon whom service of process might be had in any action in the State of Oklahoma to which said company may be a party and consenting that such service should be due and legal service on the company and that all actions against it might be brought in the county in which the cause of action arose.

## CONCLUSIONS OF LAW

## I

That Order No. 3388 of the Corporation Commission is a legislative order, and that the Supreme Court of Oklahoma in affirming said order acted legislatively and only gave legislative effect thereto.

[fol. 97]

## II

That under the Constitution of the United States and under the Constitution and Laws of Oklahoma, this court has jurisdiction and it is its duty to judicially determine the validity of said Order No. 3388 in this action.

## III

That the Oklahoma Natural Gas Company has never held itself out and had never agreed or professed to serve gas to Wilson & Company or any consumer similarly situated to Wilson & Company, Inc., and was not obligated by virtue of any franchise to serve the said Wilson & Company, Inc., and, therefore, said Order No. 3388 is null and void, as being contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States and of the Constitution of the State of Oklahoma.

## IV

That at the time of the making of said Order No. 3388 and continuously prior thereto for a long period of time the Oklahoma Gas and Electric Company was supplying gas to Wilson & Company, Inc., under rates fixed by the Corporation Commission of the State of Oklahoma, which business was remunerative to the Oklahoma Gas and Electric Company, and the enforcement of said invalid order would and does deprive the Oklahoma Gas and Electric Company of its remunerative business contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of Oklahoma, and because of said invalidity the plaintiffs are entitled to a permanent injunction enjoining the enforcement of said invalid order by Wilson & Company or by any person or corporation acting by, through, or under it.

Edgar S. Vaught, United States District Judge.

Dated this 30th day of July, 1937.

## IN UNITED STATES DISTRICT COURT

OPINION.—Filed July 30, 1937

This case has been pending in this court for practically seven years. The original bill was filed by the complainants [fol. 98] July 24, 1930; praying an injunction against the defendant from prosecuting its action in the state court for the recovery of alleged excess charges for natural gas furnished to the defendant, Wilson & Company, Inc., at its yards in Oklahoma City.

The cause was heard on a motion to dismiss on February 26, 1931, and this court dismissed the cause on the ground that the state court, having jurisdiction to dispose of the issues and matters in controversy between the complainants and the defendant, Wilson & Company, Inc., had rendered judgment in the case and that said judgment was a final judgment and was binding upon this court.

The complainants, however, contended that the hearing before the Corporation Commission was legislative in its character, and the appeal from the Corporation Commission to the Supreme Court of the state was an appeal to the Supreme Court acting in a legislative capacity and that therefore the complainants were denied a judicial hearing.

The cause was appealed to the Circuit Court of Appeals and on January 30, 1932, the Circuit Court reversed the decision of this court and vacated the decree, holding that the Commission's order requiring the gas company to supply gas to an industrial consumer at a specified rate was legislative and that complainants were entitled to a judicial hearing in federal court. *Oklahoma Gas & Electric Co., et al. v. Wilson & Co., Inc., of Okla., et al.*, 54 Fed. (2d) 596.

On May 4, 1932, the cause was set for hearing before three judges, (Cottrell, Circuit Judge, Kennedy and Vaught, District Judges.) The complainants had filed an amended pleading requesting the convening of three judges. The three judge court was convened and held that the case was not such as to give three judges jurisdiction, Circuit Judge Cottrell dissenting. The cause was thereupon, on the 18th day of May, 1932, dismissed without prejudice to a future action. Thereafter, on the 20th of May, 1932, the present entitled and numbered suit was filed, the bill asking for a hearing before three judges.

On November 28, 1932, a three judge court, consisting of



Circuit Judge McDermott and District Judges Kennamer and Vaught, was convened, and the court, as thus constituted, entered an order denying a temporary injunction and also entered an order denying a motion to dismiss.

[fol. 99] On May 19, 1933, the three judge court convened to try the cause and after a hearing rendered an opinion holding that since an action had been brought by the Oklahoma Packing Company, formerly Wilson & Company, Inc., against the Oklahoma Gas and Electric Company et al., in the state court, in which it was sought to determine the validity of the order of the Corporation Commission involved in this cause, the plaintiffs in the cause at bar had an adequate remedy at law by defending in the state court. Therefore, the injunction was denied.

This decree was rendered on the 22nd day of September, 1933, and on December 14, 1933, an appeal was taken to the Supreme Court of the United States. The cause was heard before that court and on June 19, 1934, the mandate from the Supreme Court of the United States was filed in this court, the judgment of the Supreme Court vacating the decree of this court, holding that said cause was not a cause requiring a hearing before three judges and remanding the cause for a hearing before the District Judge of this District.

On December 3, 1931, Wilson & Company, Inc., brought an action at law in the District Court of Oklahoma County, Oklahoma, against the Oklahoma Gas and Electric Company and the Fidelity and Casualty Company of New York, upon bonds given to supersede the order of the Corporation Commission pending review, and upon an alleged oral agreement of the Oklahoma Gas and Electric Company to repay to Wilson & Company, Inc., any sums collected in excess of those which would have been payable if the order had not been superseded. In its answer in that case, the Oklahoma Gas and Electric Company alleged (a) that the order of the Corporation Commission was legislative in character, as was the decision of the Supreme Court of Oklahoma affirming the same, and that under the Constitution and Laws of the United States, the defendant had the right to have a judicial decision of the court upon both the law and the facts affecting the validity of said order; and (b) that the order was null and void for substantially the same reasons as set out in the bill filed in this action. There was a four day trial in the state court, on the issues so joined, and on April 5, 1933, judgment was entered by that court in favor of the

plaintiff. Findings of the evidentiary facts, substantially as stipulated by the parties herein, were made by that court. [fol. 100] The court concluded as a matter of law that it had jurisdiction and that it was its duty to determine judicially the validity of the order of the Corporation Commission now under attack. The appeal from said judgment to the Supreme Court of Oklahoma was perfected, and the judgment superseded pending such appeal. On September 15, 1936, the Supreme Court of Oklahoma reversed the decision and judgment and held that said court had no jurisdiction to proceed in the matter until this suit was disposed of by this court. *Oklahoma Gas and Electric Co. v. Wilson & Co., Inc.*, 63 Pac. (2d) 703.

Thus the cause comes back to this court for determination, for the first time, of the real issue in the case, namely, the validity of the order of the Corporation Commission.

The facts are practically all stipulated as set out in the findings of fact filed with this opinion.

At all the times mentioned in complainants' petition, the Oklahoma Natural Gas Company was a corporation engaged in the business of the production, transportation and sale of natural gas as a public utility, supplying gas at various towns and cities in Oklahoma for domestic and industrial consumption. It held franchises for local distribution in a few towns and cities but none in Oklahoma City.

The Oklahoma Packing Company, formerly Wilson & Company, Inc., is a corporation operating a manufacturing plant situated in Oklahoma City southwest and outside of the corporate limits of the city of Oklahoma City.

The Oklahoma Gas and Electric Company is a corporation, at all of the times herein involved, engaged in the distribution of gas in Oklahoma City to domestic and industrial consumers in Oklahoma City and immediate vicinity, operating under a franchise from the city. Prior to the promulgation by the Corporation Commission of what is known as the gate rate order in June, 1931, the Oklahoma Natural Gas Company was supplying the Oklahoma Gas and Electric Company with natural gas at Oklahoma City under contracts and arrangements on the percentage basis.

At the time of making said gate rate order, and for some time prior thereto, there were only two reducing stations at, or through which the gas was reduced from high pressure to low pressure and delivered by said Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company,

[fol. 101] one of such stations being located at Thirty-sixth Street and Santa Fe Avenue, and the other being located at Pennsylvania and Reno Avenues, both of which stations were then outside the city limits of Oklahoma City, both of same being northerly or north and west of the city.

The Oklahoma Natural Gas Company in 1921 constructed a six-inch gas line connected with its system and extending east and west through Ash Avenue west of Oklahoma City and located about five or six hundred feet south of the engineroom of Wilson & Company, Inc.

The complainant, the Oklahoma Gas and Electric Company, desired to serve gas to Wilson & Company, Inc. for fuel purposes and made an arrangement or agreement with the Oklahoma Natural Gas Company in 1924, at some date following the month of September, to move its measuring station or meter from its location at or near the intersection of Agnew and Hickory Streets, to some point west of the plant of Wilson & Company, Inc., and the said measuring station was finally located at or near Ash and May Avenues, approximately one-third of a mile west of Wilson & Company, Inc.'s plant and approximately 3,000 west of Agnew Street, the city limits of Oklahoma City.

The Oklahoma Gas and Electric Company on April 3, 1925, purchased that part of the Oklahoma Natural Gas Company's line between the city limits and the measuring station at Hickory Street. The Oklahoma Gas and Electric Company constructed a service line extending from the main on Ash Avenue to the boilerroom of Wilson & Company, Inc., and the necessary meters and measuring devices, a distance of about 450 feet.

Prior to the making of the gate rate order in 1921, the Oklahoma Gas & Electric Company had been supplying gas to users at Oklahoma City, both within and without the city limits. When the gate rate order was made and the Oklahoma Natural Gas Company was required to put in gates and measures, sell and deliver the gas to the Oklahoma Gas and Electric Company at said gates, there were several consumers of gas outside of and beyond the location of the gate stations, who had been supplied by the Oklahoma Gas and Electric Company, and in carrying out said order, it was agreed between the Oklahoma Gas and Electric Company [fol. 102] and the Oklahoma Natural Gas Company, with the assent of the Corporation Commission that the Oklahoma Natural Gas Company could, if it desired, con-

tinued to supply gas to such consumers outside the gate and all or some of them were continued to be so supplied by the Oklahoma Natural Gas Company after said gate order. During 1924, 1925 and 1926 the Oklahoma Natural Gas Company served gas to Lorris E. Cobb, R. S. Schuneman and Billie Gregg, outside of the city limits and outside the measuring stations. However, each of them consumed less than one hundred thousand cubic feet per month. No other consumers, except Gregg, were furnished gas by the Oklahoma Natural Gas Company outside the said gates, except consumers over whose land its pipe line was laid, and except certain domestic customers who were outside the city gates or measuring stations on the lines of the Oklahoma Natural Gas Company and were being served by the Oklahoma Gas and Electric Company at the time of the gate rate order. The Oklahoma Natural Gas Company never served consumers inside of the gates whose gas had been measured and charged to the distributing company. It had no desire to furnish any gas in competition with its biggest customer, the Oklahoma Gas and Electric Company, who was purchasing all its gas from the Oklahoma Natural Gas Company.

In September, 1924, the Oklahoma Natural Gas Company made its application to the Corporation Commission of the state of Oklahoma, to establish a reduction in rates for gas for industrial purposes; the Corporation Commission acted upon its application and by Journal Entry No. 1203 in Cause No. 6030, authorized the Oklahoma Natural Gas Company to establish rates for industrial gas of thirty-eight cents per thousand cubic feet, for the first one hundred thousand cubic feet, per month, and fifteen cents per thousand cubic feet, for all gas in excess of the first one hundred thousand cubic feet, per month, provided there was a minimum consumption of thirty million cubic feet per month, per customer; said rates were to apply to consumers located outside of the city limits of the cities served by the Oklahoma Natural Gas Company as a distributor; the Corporation Commission did, by its Journal Entry No. 3276 in Cause No. 5965, authorize the Oklahoma Natural Gas Company to reduce its rates to thirty-five cents per thousand cubic feet for the first one hundred thousand cubic feet, per month, and fifteen cents per thousand cubic feet, for all in excess of the first one hundred thousand cubic feet, per [fol. 103] month, where the consumer used a minimum of



fifteen million cubic feet per month; said rate became effective on January 1, 1926. The record discloses that the Oklahoma Natural Gas Company did, from and after January 1, 1926, furnish gas to Producers & Refiners Corporation, located immediately outside of Tulsa, Oklahoma, at the rate of thirty-five cents per thousand cubic feet, for the first one hundred thousand cubic feet, per month, and fifteen cents per thousand cubic feet for all over one hundred thousand cubic feet. The consumption of the Producers & Refiners Corporation during the months of January, to and including the month of September, 1926, was from 45,898,000 cubic feet to 65,287,000 cubic feet. The Oklahoma Natural Gas Company also furnished industrial gas to several other industrial users at Sapulpa and Tulsa. The Oklahoma Natural Gas Company, however, had franchises, owned and operated the gas distribution systems in the cities of Sapulpa and Tulsa during all of the times herein involved.

In December, 1924, the Oklahoma Gas and Electric Company began serving gas to Wilson & Company, Inc., and built a service line from the six-inch line in Ash Street to Wilson & Company, Inc.'s boilers. On April 13, 1926, upon complaint of Wilson & Company, Inc., the Corporation Commission promulgated its Order No. 3388, which order required the Oklahoma Natural Gas Company to serve Wilson & Company, Inc., with gas at its industrial rate. Both the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company appealed to the Supreme Court and the Oklahoma Gas and Electric Company gave bond to supersede the execution of the order and supersedeas was ordered upon filing and approving bonds.

In the month of September, 1926, the Oklahoma Natural Gas Corporation purchased the natural gas system of Oklahoma Natural Gas Company and continued thereafter to operate the transmission and distribution systems in Oklahoma. As of March 1, 1928, the Oklahoma Natural Gas Corporation purchased the natural gas distributing systems of the Oklahoma Gas and Electric Company in the various cities and towns in Oklahoma, including Oklahoma City, and thereafter operated said distributing systems in said cities and towns. The Oklahoma Natural Gas Corporation concurrently, with the commencement of its operations of the [fol. 104] gas distributing systems in said cities and towns previously owned and operated by the Oklahoma Gas and Electric Company, placed in effect in said cities and towns

its industrial gas rates that had theretofore been effective in other cities and towns, and on the general system owned and operated by Oklahoma Natural Gas Corporation. The Oklahoma Natural Gas Corporation after March 1, 1928, furnished gas to Wilson & Company, Inc., for boiler fuel purposes at its established rate of thirty-five cents for the first one hundred thousand cubic feet per month and fifteen cents per thousand cubic feet, for all in excess thereof, during the months that the total consumption exceeded fifteen million cubic feet.

Prior to 1924 all gas used by Wilson & Company, Inc., was purchased from the Oklahoma Gas and Electric Company and delivered through a line extending from the measuring stations located at Reno and Pennsylvania and Thirty-sixth and Santa Fe.

The Oklahoma Natural Gas Company has not served, nor professed to serve, gas to consumers upon the lines of the Oklahoma Gas and Electric Company located within the city gates, that is, beyond the point where the gas sold by the Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company is measured. The Oklahoma Natural Gas Company sold no gas to Wilson & Company, Inc., prior to the order complained of.

The rates charged by the Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company for gas delivered to it, and the rates charged by the Oklahoma Gas and Electric Company to Wilson & Company, Inc., were those prescribed by the Corporation Commission of Oklahoma.

The order complained of was rendered by the Corporation Commission upon complaint of Wilson & Company, Inc., which order, No. 3388, is in substance as follows:

"It is, therefore, the Order of the Commission, premises considered, that the Oklahoma Natural Gas Company be and it is hereby required to supply Wilson & Co., Inc., of Oklahoma, at its packing plant located in the angle created by the intersection of Ash St. and May Ave. southwest of the City of Oklahoma City with natural gas for its use as fuel at said plant, at the rate of 35 cents per thousand for the first 100,000 cu. ft. and 15 cents per thousand for [fol. 105] each additional one thousand cubic feet thereafter, provided that this rate shall not apply to consumption of less than 15 million cubic feet per month.

"This order is conditioned upon Wilson & Co., Inc., of Oklahoma, either taking over and purchasing the present service line owned and operated by the Oklahoma Gas & Electric Company, or the laying and installing of its own service lines, with all measuring devices and facilities which may be necessary to be installed in rendering said service, without expense to the Oklahoma Natural Gas Company.

"It is the further order of the Commission that said connection be made and gas turned into the service line of said Wilson & Co., Inc., of Oklahoma, within ten days from and after notice to said company of the completion of said service line and of the company's readiness of accept service."

Both the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company petitioned the Supreme Court of Oklahoma for review of the order of April 13, 1926, and pending such review, the order was superseded as provided by the statutes of Oklahoma. On April 29, 1930, the Supreme Court of Oklahoma affirmed the order of the Corporation Commission. It is the contention of the complainants, however, that such review by the Supreme Court was legislative and not judicial and that the complainants are entitled to have a judicial determination of the validity of said order.

The first question to be determined is whether or not the hearing before the Supreme Court and the judgment rendered therein constituted a judicial review of the order of the Corporation Commission. Fortunately this question has been decided, so far as this court is concerned.

In this case, the Tenth Circuit Court of Appeals, 54 Fed. (2d) 596, held, quoting from the syllabus:

"Commission in prescribing rates and regulations for public utilities acts only within powers delegated by State Constitution, which are legislative, not judicial.

"Commission's order requiring gas company to supply gas to industrial consumer at specified rate held 'legislative', entitling company to judicial adjudication in federal court.

"Under Oklahoma Constitution, state Supreme Court, in affirming commission's order requiring gas company to

supply gas to consumer at specified rate, acted only legislatively, entitling company to judicial adjudication in federal court."

The authorities in support of said opinion are fully set out therein and it is not necessary to repeat them in this opinion.

That question being eliminated, the next proposition for determination by this court is whether or not the Corporation Commission had the power to promulgate Order No. 3388.

Under the evidence in this case, the Oklahoma Natural Gas Company had no franchise to furnish gas to consumers in Oklahoma City. The franchise for that purpose was held by the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company merely furnished the gas at the city gate to the Oklahoma Gas and Electric Company which received the gas at the gate and distributed it to the consumers.

It is contended by the defendants that the Oklahoma Natural Gas Company was the distributor and that in the vicinity of Tulsa and Sapulpa, it distributed gas to industrial consumers at the industrial rate but under the evidence, the Oklahoma Natural Gas Company had a franchise for distribution of gas to consumers both at Tulsa and Sapulpa.

A very different situation existed at Oklahoma City, where the Oklahoma Natural Gas Company was not a distributor to consumers but was merely a wholesaler delivering gas to the Oklahoma Gas and Electric Company, the distributor to consumers under a valid franchise.

There is no question but that it would have been much more convenient for the defendant to have received its gas directly from the Oklahoma Natural since the Oklahoma Natural Gas Company's lines passed within a reasonable distance of the defendants' plant, but would that circumstance be sufficient to justify the Commission ordering and directing the Oklahoma Natural Gas Company to provide gas to a distributor, in the vicinity of Oklahoma City?

[fol. 107] In Oklahoma Natural Gas Co. v. Corporation Commission, 88 Okl. 51, 211 Pac. 401, the court said:

"The authorities are harmonious in holding that one enters the public business by professing or undertaking to



serve the public, and that his public obligation is limited by the extent of his profession. Thus in Wyman on Public Service Corporations, Vol. 1, Section 250, it is said:

“Public profession not only establishes public obligation, but it largely determines the extent of the public duty. Just as people cannot be forced to serve unless they have made public profession, so they cannot be forced to serve beyond what their profession covers.”

“So the primary question is what the profession of the appellant necessarily covers, and this is a question of fact, rather than of law.”

“The appellant has undertaken to serve the inhabitants of certain cities, towns and communities within the state, and to them it owes the duty of furnishing adequate service, and may be required within reasonable limitations to serve all inhabitants thereof who may apply.” (Citing authorities.)

“But the appellant has not undertaken or professed to serve the City of Chickasha, neither does it profess to serve the state at large. The fact that it is a public utility does not necessarily cast upon it the duty of serving the public at large. This duty is not to all men, but to a certain public limited by its profession. Wyman on Public Service Corporations, Sec. 344; and, while the Corporation Commission may within constitutional and reasonable limitations compel appellant to extend its service within the boundaries of those cities it is now serving, or those it may undertake to serve, it is without power or authority to compel appellant to serve a city not included within its profession of service. To compel the appellant to extend its service to a city, town or community it has not undertaken or professed to serve, and which it does not desire to serve, is tantamount to an appropriation of private property for public use without just compensation.” (Citing authorities.)

[fol. 108]. The Supreme Court of Oklahoma in the case of *In re. Vance et al.*, 115 Okl. 241 Pac. 164, said:

“The Corporation Commission has no authority to require a public utility to furnish natural gas to people living outside the city limits where the utility has never professed or undertaken to serve the people of that community generally, even though it may appear that the gas company has a pipe line in close proximity to the property of such persons.”

This doctrine has not only been recognized by Oklahoma but by the Supreme Court of the United States, which court in *Interstate Commerce Commission v. Oregon-Western Ry. Co.*, 288 U. S. 14, said:

"Those decisions show that due process is denied by requiring service which goes beyond the undertaking of the carrier. . . . No extension ordered for the service of new territory had been approved. Whenever the state attempted to enforce a regulation or demand extension of facilities outside the company's undertaking to serve the public, the power was negated for the very reason that the attempted exercise called on the railroad company for something beyond its agreement."

And in that case the Supreme Court cited *Oklahoma Natural Gas Co. v. Corporation Commission*, *supra*.

It is contended that three residents of the vicinity immediately joining the corporate limits of Oklahoma City were furnished gas by the Oklahoma Natural Gas Company. It is admitted, however, that two of these were those, through whose lands the lines of the Oklahoma Natural Gas Company passed, and the contract for furnishing them gas was incidental to its procuring right of way through said lands. One other was remotely situated from Oklahoma City. But even under those circumstances, the Commission would have no power to require the Oklahoma Natural Gas Company to furnish gas to Wilson & Company, Inc.

In *Younts v. Southwestern Tel. & Tel. Co.*, (E. D. Ark.) 192 Fed. 200, that court said:

"It is not claimed; nor can it be justly claimed, that the defendant can be compelled as a matter of course to extend its lines outside of the corporate limits of the city [fol. 109] for one-half mile or more whenever demanded by a resident. Nor does the fact that the company sees proper to grant such a privilege to one or two parties change this rule. The defendant had the right to build and maintain a line some distance from its lines as a gratuity or a special favor. Whether it was prompted to do so by the expectation of more subscribers along that line or as a matter of grace to the particular persons is immaterial. It is only when these facilities are granted generally to persons similarly situated as the plaintiff that the refusal to

extend to him the same privileges may become a discrimination within the meaning of the statute."

"Nor does the fact that plaintiff offered to pay the expense of constructing this line change the duties and responsibilities of defendant. The company cannot be compelled to accept gratuities. Besides, there is no offer to pay for the maintenance of the line which may amount to a great deal more than its construction or the rental paid by plaintiff."

In *United Fuel Gas Company v. Public Service Commission* (W. Va.) 144 S. E. 723, the Supreme Court of West Virginia, in reviewing an order of the Public Service Commission of that state, said:

"While it is true that a public utility may be required to serve every applicant within the territory it professes to serve, it cannot be required to extend that service outside of such territory. To generalize from all cases that have been discussed, it would seem to be proper to say that one who undertakes a public service owes a duty to serve every member of the public within his profession. That which in the quaint language of the earlier cases may seem a mere conceit, really is practically the truth of the matter. One who undertakes public employment has, in effect, thereby proposed and vested an interest of himself in all the King's subjects that will employ him in the way of his trade. But the duty as thus defined is not to all men but to a certain public limited in various ways according to the usual profession. Thus a gas company owes its duty only to those who occupy premises within the territory covered by the service.' 1 Wyman on Public Service Corporation, Sec. 344. This rule seems altogether reasonable; otherwise a [fol. 10] gas company could be compelled to tap its high-pressure line at any point for the benefit of a few applicants, install pressure reducers and lay pipe to the applicants' houses, regardless of the reasonableness of the proposition."

The order complained of sought to compel the Oklahoma Natural Gas Company to give service to Wilson & Company, Inc., at its manufacturing plant a short distance outside the

city limits, when under all the evidence, the Oklahoma Natural Gas Company had never contracted to or professed to serve any industries or manufacturing plants in or around Oklahoma City and had no legal duty to serve gas in or around Oklahoma City, created by contract or statute, save and except in cases where its transmission lines crossed private property, and actually served but a very few domestic customers located on its lines in the territory outside Oklahoma City, which customers were not served because of a statutory duty, but because of its election, in the exercise of its business policy, to give service to certain homes. This election did not constitute a profession to serve large industries and manufacturing plants. See *Southern Bell Tel. & Tel. Co. v. Town of Calhoun* (W. D. So. Carolina), 287 Fed. 381; *Wyoming Valley Water Supply Co. v. Public Service Commission*, 159 Atl. 340.

The court has examined with care the authorities cited by the defendants but the doctrine herein announced is abundantly supported by the weight of authority.

The court, therefore, is forced to the conclusion that the order of the Corporation Commission complained of is invalid for the reason that said Commission had no authority, under the laws of the state, to promulgate such order. The temporary injunction heretofore granted is made permanent.

The court is filing findings of fact and conclusions of law with this opinion and a form of decree consistent therewith may be submitted on or before September 10, 1937. An exception is allowed the defendants.

(Signed) Edgar S. Vaught, United States District Judge.

July 30, 1937.

[fol. 111] IN UNITED STATES DISTRICT COURT

DECREE—Filed September 10, 1937

This cause came on to be further heard at this term and the Court having heretofore filed, herein on the 30th day of July, 1937, its findings of fact, conclusions of law, and opinion.

It Is, Therefore, Ordered, Adjudged and Decreed that the complainants have a permanent and perpetual injunction



against Wilson & Company, Inc., of Oklahoma, a Delaware corporation, and Oklahoma Packing Company, formerly Wilson & Company, Inc., of Oklahoma, an Oklahoma corporation, as prayed for herein, and that Wilson & Company, Inc., of Oklahoma, a Delaware corporation, and Oklahoma Packing Company, formerly Wilson & Company, Inc., of Oklahoma, an Oklahoma corporation, and each of them, their officers, agents, and attorneys, and all persons acting or claiming through or under them, or any of them, be, and they are hereby permanently and perpetually enjoined from enforcing or taking any steps to enforce Order No. 3388 of the Corporation Commission of the State of Oklahoma, entered on April 13, 1926, or any of the terms or provisions thereof, and further perpetually and permanently enjoined and prohibited from further proceeding in or attempting further to proceed in or prosecute, other than to dismiss the same with prejudice, a certain action pending in the District Court of Oklahoma County, Oklahoma, numbered 71,898, wherein Wilson & Company, Inc., of Oklahoma, a corporation, is plaintiff and Oklahoma Gas and Electric Company, a corporation, and The Fidelity and Casualty Company of New York, a corporation, are defendants, and further perpetually and permanently enjoined and prohibited from commencing or prosecuting, or attempting so to do, any other action or proceeding in law, equity or otherwise upon or on account of any of the matters involved in said action in said District Court of Oklahoma County, or at any time or place or in any manner making any claim or claims or asserting any rights claimed, set forth or involved in said action in said District Court of Oklahoma County, Oklahoma.

The injunction prayed for against the Corporation Commission of Oklahoma and its members is denied, but without prejudice to the rights of the complainants to take further action should the Corporation Commission of the State [fol. 112] of Oklahoma, in any manner threaten or endeavor to enforce said Order No. 3388.

Dated this 10th day of September, 1937.

Edgar S. Vaught, Judge.

## IN UNITED STATES DISTRICT COURT

## MOTION TO MODIFY FINDING OF FACTS AND CONCLUSIONS OF LAW AND REQUEST FOR ADDITIONAL FINDING OF FACTS AND CONCLUSIONS OF LAW—Filed September 10, 1937

Now comes the defendants, Oklahoma Packing Company and Wilson & Co., Inc. of Oklahoma, and requests the court to modify each of its findings of fact as specified below and to modify each of its conclusions of law as specified below, and further requests the court to make each of the following additional findings of fact as specified below and to make each of the following conclusions of law as specified below:

1. That the V finding of fact be amended by striking out the following:

"but if the order complained of had not been made, it could reasonably be expected that Wilson & Company, Inc., would have continued to purchase gas from the Oklahoma Gas and Electric Company at a profit to it of approximately five cents a thousand cubic feet."

This is not a finding of fact but is mere speculation and is not based on any evidence in the record.

2. That finding of fact VI be modified by striking out the following:

"and the rates charged by the Oklahoma Gas and Electric Company to Wilson & Company, Inc.,"

There is no evidence in the record of any rates of Oklahoma Gas & Electric Company being prescribed by the Corporation Commission. It was stipulated by the parties and this court has found, Finding I-1:

"Oklahoma Gas and Electric Company engaged in the distribution of gas in Oklahoma City operating under a franchise from the city."

3. That finding of fact VIII be modified by adding at the end thereof the following:

[fol. 113] "The Supreme Court of Oklahoma held:

### "Assignment of Errors

"Defendants have assigned fifteen different errors. Both have wisely suggested and have combined and presented said errors under two heads, viz.:

"1. The order of the commission is not supported by the evidence, and is contrary to law.

"2. Said order is violative of section 7, art. 2, of the Constitution of Oklahoma, and of the Fourteenth Amendment to the Constitution of the United States.

"Defendants aver in their first assignment of error: 'That the order of the commission is not supported by the evidence.'

"We think, after a careful study of the evidence and the findings of facts by the commission, as set out above, the evidence is quite sufficient to sustain said findings, and to warrant the commission in making the order complained of, and that any further discussion as to the sufficiency of the evidence is unnecessary.

"The order of the commission in the present case cannot be said to be a taking of property without due process of law. Hearing was had before a legally constituted tribunal. Notice, an opportunity to be heard, an opportunity to defend and all the proceedings leading up to and including the hearing were regular and denied appellant none of the rights constituting due process of law, and appeal has been taken to a court authorized by law to review the proceedings and findings of the commission.

"This defendant O. G. & E. also contends and assigns as error 'that the order of the commission depriving it of the right to furnish the plaintiff with gas is violative of section 7, Art. 2, of the Constitution of the State of Oklahoma and of the 14th Amdt. to the Constitution of the United States, in that said order would operate to deprive this defendant of its property without due process of law and to deny it the equal protection of the law.'

4. That finding of fact IX (b) be modified by striking out [fol. 114] the figures "1923" and inserting in lieu thereof the figures "1933" to conform to the facts.

That said finding be further modified by adding at the end thereof the following:

"The State Supreme Court held:

" . . . it is now settled that the decision of this court on appeals from orders of the Corporation Commission affecting rates of public utilities constitutes a judicial determination of the questions involved."

That the court make each of the following additional findings of fact:

5. That the defendant, C. C. Childers, ceased to occupy the office of a member of the Corporation Commission of Oklahoma on January —, 1933; the defendant, Paul Walker, ceased to occupy the office of a member of the Corporation Commission of Oklahoma on July 10, 1934; E. R. Hughes ceased to occupy the office of a member of the Corporation Commission of Oklahoma on January 14, 1935; and the defendant, J. Berry King, ceased to occupy the office of Attorney General of the State of Oklahoma on January 14, 1935. (See affidavit in support of motion to abate suit as to these defendants.)

6. Wilson & Co., Inc., of Oklahoma, a Delaware corporation, duly licensed and having a place of business in the Western District of Oklahoma, appeared specially and solely for the purpose of objecting to being sued in said district and moved the court to dismiss the bill of complaint so far as the bill related to it. This District Court overruled its motion, and it then answered the bill of complaint, reserving to itself the benefit of its objection to being sued in the Western District of Oklahoma.

7. The Complainants have not charged or proved that Oklahoma Packing Company brought any action or threatened to bring any action against any of the Complainants to enforce Order No. 3388 of the Corporation Commission of Oklahoma.

8. The Complainants have failed to establish that the Oklahoma Natural Gas Company has been dissolved or that the individual complainants are the directors of said corporation.



[fol. 115] 9. The Complainants have failed to prove that the Oklahoma Natural Gas Corporation is successor in interest of the Oklahoma Natural Gas Company.

10. The supersedeas bonds filed by the complainant Oklahoma Gas and Electric Company recite that the order of the Corporation Commission had been superseded.

11. The Complainant Oklahoma Gas and Electric Company, undertook in its supersedeas bonds to repay to Wilson & Co., Inc., of Oklahoma the amounts collected in excess of the rates prescribed in the order appealed from in the event of the Supreme Court of Oklahoma affirming the order.

12. The Oklahoma Natural Gas Co. and Oklahoma Natural Gas Corporation are not parties to the suit in the District Court of Oklahoma County, Oklahoma, and neither of them has any interest in the subject matter of that litigation. (Opinion J. McDermott on final hearing before three judges, 6 Fed. Sup. 893.)

That the court modify its conclusions of law:

1. That conclusion of law No. I be modified by striking out the following words "legislatively and only gave legislative effect thereto" and insert in lieu thereof the word "judicially" in order to follow the State Supreme Court's construction of the State Constitution and State Statutes as all the Federal courts are bound to do.

2. That conclusion of law No. II be modified by striking out the following words "has jurisdiction and it is its duty" and insert in lieu thereof the following words "has no power."

3. That the conclusions of law be modified by striking out all of No. III.

This question was submitted by the complainants to the State Supreme Court and they are bound by that decision and can not now after the question was decided against them, deny that the State Supreme Court had power to decide that question.

4. That the conclusions of law be modified by striking out all of conclusion No. IV.

The question was submitted by the complainants to the [fol. 116] State Supreme Court and they are bound by that

decision and can not now after the question was decided against them, deny that the State Supreme Court had power to decide that question.

That the court make the following conclusions of law:

5. That the Oklahoma Gas & Electric Company and the Oklahoma Natural Gas Company, having voluntarily brought the question of the order of the Corporation Commission violating the Fourteenth Amendment of the United States Constitution before the State Supreme Court upon appeal from the Corporation Commission, can not, after that question has been decided adversely, be heard to object to the power of that court to decide the constitutional question presented.

6. A suit against the Corporation Commission of Oklahoma is not within the jurisdiction of the District Court of the United States.

7. The State of Oklahoma has not consented to be sued in the name of the Corporation Commission of Oklahoma in the District Court of the United States.

8. The suit against Paul Walker, C. C. Childers and E. R. Hughes abated when they ceased to be members of the Corporation Commission of the State of Oklahoma; the suit against J. Berry King abated when he ceased to be Attorney General of the State of Oklahoma.

9. The cause of action having abated as to the state officers, the complainants, Oklahoma Natural Gas Company, W. T. Phillips, H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard, and R. C. Sharp, as the alleged directors of the Oklahoma Natural Gas Company, an alleged dissolved corporation, and Oklahoma Natural Gas Corporation, cannot maintain their suit and bill of complaint must be dismissed as to each of them.

10. Wilson & Co., Inc., of Oklahoma, a Delaware corporation, cannot be sued in the Western District of Oklahoma and the bill of complaint must be dismissed as to it.

11. The bill of complaint must be dismissed as to W. T. Phillips, H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. [fol. 117] W. Hannan, A. W. Leonard, and R. C. Sharp, directors of Oklahoma Natural Gas Company, since the complainants have failed to prove that that company was dissolved.

12. The bill of complaint must be dismissed as to the Oklahoma Natural Gas Corporation, since the complainants have failed to prove that it is a corporation and that it is successor of the Oklahoma Natural Gas Company.

13. The complainants having failed to allege or prove that Oklahoma Packing Company, formerly named Wilson & Co., Inc., of Oklahoma, an Oklahoma corporation, has taken or threatened to take any action against the complainants or either of them to enforce Order No. 3388 of the Corporation Commission of Oklahoma, the bill of complaint must be dismissed for want of equity as to Oklahoma Packing Company.

14. The only liability to which the complainants or either of them may now be subjected is the repayment to Wilson & Co., Inc., of Oklahoma, the excess amounts collected by the Oklahoma Gas & Electric Company over the rates prescribed in the order of the Corporation Commission. Such liability, if any, attaches only to the Oklahoma Gas & Electric Company and to its surety upon the supersedeas bonds.

15. This court is prohibited by section 265, Judicial Code, from enjoining the en personam action for damages of Wilson & Co., Inc., of Oklahoma against the complainant Oklahoma Gas & Electric Company and its surety.

16. The contract between the Oklahoma Natural Gas Company and Oklahoma Gas & Electric Company that the Oklahoma Natural Gas Company would not serve gas to Wilson & Co., Inc., of Oklahoma, as found in the findings of fact No. II, impaired the discharge of a duty of the Oklahoma Natural Gas Company to the public. The complainants are in equity seeking the aid of the court in carrying out this illegal contract, and are in equity with unclean hands.

17. The Oklahoma Natural Gas Company had under [fol. 118] taken to serve industrial gas to persons similarly situated to Wilson & Co., Inc., of Oklahoma.

Respectfully submitted, —, —, —, —, Attorneys for Defendants, Oklahoma Packing Company, and Wilson & Co., Inc., of Oklahoma.

## IN UNITED STATES DISTRICT COURT

ORDER ON MOTION TO MODIFY FINDINGS AND CONCLUSIONS—  
Filed September 13, 1937

This cause came on to be heard upon motion of defendants, Oklahoma Packing Company and Wilson & Company, Inc., of Oklahoma, to modify findings of facts and conclusions of Law and request for additional findings of facts and conclusions of law, as per copy attached, and made a part hereof.

It is therefore, ordered, adjudged and decreed that said motion to modify findings of fact (IX) (b) by striking out the figures "1923" and insert in lieu thereof the figures "1933" be granted, and that each of said requests for other modifications and additional findings of facts numbered 1 to 12, inclusive, be and they are denied and exception is allowed to the denial of each of them.

Be it further ordered and decreed that each of the said requests for modification of and for additional conclusions of law numbered 1 to 17, both inclusive, be and they are each denied and an exception is allowed to the denial of each of them.

Upon presentment of the decree entered herein each of the said defendants objected to the entering of the same upon the ground that Wilson & Company, Inc. of Oklahoma could not be sued in this District under Section 51 of the judicial code which objection was and is hereby overruled and exception allowed each of said defendants. The said defendants each further objected to the entering of the decree enjoining the prosecution of the suit in the State Court upon the ground that such injunction was prohibited by Section 265 of the Judicial Code, which objection was and is hereby overruled and exception allowed to each of said defendants. [fol. 119] The said defendants each objected to the entering of the decree without first dismissing the bill as to all of the complainants except Oklahoma Gas and Electric Company, the only complainant, a party to or interested in the suit in the State Court, which objection was and is hereby overruled and exception allowed to each of the said defendants.

The said defendants each objected to the entering of the said decree without first dismissing the bill as to all of



the other defendants, which said objection was and is hereby overruled and exception allowed to each of said defendants.

Edgar S. Vaught, Judge.

## IN UNITED STATES DISTRICT COURT

**Condensed and Narrative Statement of Evidence—Filed  
February 28, 1938**

### STIPULATION OF FACTS

It is stipulated and agreed by and between counsel for the complainants and counsel for defendants that the following facts should be considered as evidence at the trial without the necessity of further proof, to-wit:

I. At all the times mentioned in complainants' petition, the Oklahoma Natural Gas Company was a corporation engaged in the business of the production of, transportation and sale of natural gas as a public utility supplying gas at various towns and cities in Oklahoma for domestic and industrial consumption. It held franchises for local distribution in a few towns and cities, but none in Oklahoma City.

"Wilson & Co., Inc., is a corporation operating a manufacturing plant situated in Oklahoma County southwest of and outside the corporate limits of the city of Oklahoma City. The Oklahoma Gas and Electric Company is a corporation, at all the times herein involved, engaged in the distribution of gas in Oklahoma City to domestic and industrial consumers in Oklahoma City and immediate vicinity, and operating under a franchise from the city. Prior to the promulgation by the Corporation Commission of what is known as the gate rate order in June, 1921, the Oklahoma Natural Gas Company was supplying the Oklahoma Gas and Electric Company with natural gas at Oklahoma City under contracts and arrangements on the percentage basis.

[fol. 120] "II. That at the time of making said gate rate order, and for some time prior thereto, there were only two reducing stations at, or through which the gas was reduced from high pressure to low pressure and delivered by said Oklahoma Natural Gas Company to the Oklahoma

Gas and Electric Company, one of such stations being located at Thirty-sixth Street and Santa Fe Avenue, and the other being located at Pennsylvania and Reno Avenues, both of which stations were then outside of the city limits of Oklahoma City, both of same being northerly or north of the city. All of the gas passing through the reducing station at Thirty-sixth Street and Santa Fe Avenue was gas from the north of Oklahoma City produced in the fields known as the Cushing, Kellyville, Depew and other fields in that general locality, which points are north and east of Oklahoma City, and was transmitted by the pipe lines of the Oklahoma Natural Gas Company. During the year 1919, the Oklahoma Natural Gas Company built a transmission line to the gas field known as the Chickasha field near Chickasha, Oklahoma, southwest of Oklahoma City, and said line extended from said Chickasha field to Independence Avenue in Oklahoma City and thence proceeded north on said Independence Avenue nearly a mile west of the packing plant of Wilson & Co., extending on to Reno Avenue, thence east on that Avenue to the reducing station at Pennsylvania and Reno, said Reno Avenue being something over a mile north of said packing plant. The Oklahoma Natural Gas Company in 1921, constructed a six-inch gas line connected with its system and extending east and west through Ash Avenue west of Oklahoma City, and located about five or six hundred feet south of the engine-room of Wilson & Co., Inc.; said gas line in Ash Street extended 1,500 feet east of Wilson & Co., Inc.'s plant, and connected with a meter or measuring station located at or immediately adjacent to the intersection of Hickory Street and Agnew Street, and within two hundred feet of the city limits of the city of Oklahoma City; this gas line was constructed for use in such emergency as might arise by the washing out at the river crossings of its line on Independence Avenue; the said measuring station located at or near the intersection of Hickory Street and Agnew Street, remained in this location throughout the month of September, 1924, and for some time thereafter; in September, 1924, Agnew Street was, and still is, the city limits of Oklahoma City; the plant of Wilson & Co., Inc., of Oklahoma, was, in September, 1924, and now is, located [fol. 121] immediately west of the intersection of Agnew and Hickory Streets, and approximately 1,500 feet outside the city limits of Oklahoma City.

"The defendant, Oklahoma Gas and Electric Company, desired to serve gas to Wilson & Co., Inc., for fuel purposes and made an arrangement or agreement with the Oklahoma Natural Gas Company, in 1924, at some date following the month of September, to move its measuring station or meter from its location at or near the intersection of Agnew and Hickory Streets, to some point west of the plant of Wilson & Co., Inc. of Oklahoma; and the said measuring station was finally located at or near the intersection of Ash and May Avenues, approximately one-third of a mile west of Wilson & Co., Inc.'s plant, and approximately 3,000 feet west of Agnew Street, the city limits of Oklahoma City. It was at first understood between the Oklahoma Natural Gas Company and the Oklahoma Gas and Electric Company that the measuring station should be located just south of the Wilson & Co., Inc., plant at the point where Wilson & Co., Inc., were to be served and the Oklahoma Gas and Electric Company on April 3, 1925, purchased that part of the Oklahoma Natural Gas Company's line between such point and the measuring station at Hickory Street. The Oklahoma Gas and Electric Company constructed a service line extending from the main on Ash Avenue, to the boilerroom of Wilson & Co., Inc., and the necessary meters and measuring devices, a distance of about 450 feet.

"III. Prior to the making of the gate rate order in 1921, the Oklahoma Gas and Electric Company had been supplying gas to users at Oklahoma City, both within and without the city limits. When the gate rate order was made and the Oklahoma Natural Gas Company was required to put in gates and measure, sell and deliver the gas to the Oklahoma Gas and Electric Company at said gates, there were several consumers of gas outside of and beyond the location of the gate stations, who had been supplied by the Oklahoma Gas and Electric Company, and in carrying out said order, it was agreed between the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company, with the assent of the Corporation Commission that the Oklahoma Natural Gas Company could, if it desired, continue to supply gas to such consumers outside the gate, and all or some of them were continued to be so supplied after said gate order by the Oklahoma Natural Gas Company. During 1924-1925-1926, the Oklahoma Na-

tural Gas Company served gas to Lorris E. Cobb, R. S. Schuneman and Billie Gregg, outside of the city limits and outside the measuring stations. However, each of them consumed less than one hundred thousand cubic feet per month. No other consumers except Billie Gregg, were furnished gas by the Oklahoma Natural Gas Company outside the said gates, except consumers over whose land its pipe line was laid, and except certain domestic customers who were outside of the city gates or measuring stations on the lines of the Oklahoma Natural Gas Company and were being served by the Oklahoma Gas and Electric Company at the time of the gate rate order. The Oklahoma Natural Gas Company never served consumers inside of the gates whose gas had been measured and charged to the distributing company. It had no desire to furnish any gas in competition with its biggest customer, the Oklahoma Gas and Electric Company who was purchasing all its gas from the Oklahoma Natural Gas Company.

"IV. In September, 1924, the Oklahoma Natural Gas Company made its application to the Corporation Commission of the State of Oklahoma, to establish a reduction in rates for gas for industrial purposes; the Corporation Commission acted upon its application and by Journal Entry No. 1203, in Cause No. 6030, authorized the Oklahoma Natural Gas Company to establish rates for industrial gas of thirty-eight cents per thousand cubic feet, for the first 100,000 cubic feet, per month, and fifteen cents per thousand cubic feet, for all gas in excess of the first 100,000 cubic feet, per month, provided there was a minimum consumption of 30,000.00 cubic feet per month, per customer; said rates were to apply to consumers located outside of the city limits of the cities served by the Oklahoma Natural Gas Company; the Corporation Commission did, by its Journal Entry No. 3276, in Cause No. 5965, authorize the Oklahoma Natural Gas Company to reduce its rates to thirty-five cents per thousand cubic feet for the first 100,000 cubic feet, per month, and fifteen cents per thousand cubic feet, for all in excess of the first 100,000 cubic feet, per month, where the consumer used a minimum of 15,000.00 cubic feet per month; said rate became effective on January 1, 1926; it is admitted that the Oklahoma Natural Gas Company did, from and after January 1, 1926, furnish gas to Producers & Refiners Corporation,



# MICRO CARD

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located immediately outside of Tulsa, Oklahoma, at the [fol. 123] rate of thirty-five cents per thousand cubic feet, for the first 100,000 cubic feet; per month, and fifteen cents per thousand cubic feet for all over 100,000 cubic feet; that the consumption of the Producers & Refiners Corporation during the months of January, to and including the month of September, 1926, was from 45,898,000 cubic feet, to 65,287,000 cubic feet. Also the Oklahoma Natural Gas Company furnished industrial gas to several other industrial users at Sapulpa and Tulsa. The Oklahoma Natural Gas Company had franchises and owned and operated the gas distribution systems in the cities of Sapulpa and Tulsa during all of the times herein involved.

"V. In December, 1924, the Oklahoma Gas and Electric Company began serving gas to Wilson & Co. and built a service line from the six-inch line in Ash Street to Wilson & Co.'s boilers. April 13, 1926, upon complaint of Wilson & Co. the Corporation Commission promulgated its order No. 3388, which order required the Oklahoma Natural Gas Company to serve Wilson & Co. with gas at its industrial rate. Both the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company appealed to the Supreme Court and the Oklahoma Gas and Electric Company gave bond to supersede the execution of the order and supersedeas was ordered upon filing and approving bonds.

"VI. In the month of September, 1926, the Oklahoma Natural Gas Corporation purchased the natural gas system of Oklahoma Natural Gas Company and continued thereafter to operate the transmission and distribution systems in Oklahoma. As of March 1, 1928, the Oklahoma Natural Gas Corporation purchased the natural gas distributing systems of the Oklahoma Gas and Electric Company in the various cities and towns in Oklahoma, including Oklahoma City, and thereafter operated said distributing systems in said cities and towns. The Oklahoma Natural Gas Corporation concurrently, with the commencement of its operations of the gas distributing systems in said cities and towns previously owned and operated by Oklahoma Gas and Electric Company, placed in effect in said cities and towns its industrial gas rates that had therefore been effective in other cities and towns, and on the general system owned and operated by Oklahoma Natural Gas Corporation. The Oklahoma Natural Gas Corporation

after March 1, 1928, furnished gas to Wilson & Co. Inc. for boiler fuel purposes at its established rate of thirty-five [fol. 124] cents for the first 100,000 cubic feet per month, and fifteen cents per 1,000 cubic feet, for all in excess thereof, during the months that the total consumption exceeded 15,000,000 cubic feet.

"VII. It is agreed that Billie Gregg's place where the Oklahoma Natural Gas Company served gas after the gate rate order was located outside and beyond the city measuring stations and was approximately three miles north of Wilson & Co.'s plant and approximately a mile west of the city limits of Oklahoma City.

"VIII. It is agreed that gas was furnished by Oklahoma Natural Gas Company to Oklahoma Gas and Electric Company through the measuring station located near the intersection of Hickory and Agnew streets in the following quantities and during the following months, to-wit:

January, 1922	563,000 cubic feet
October, 1923	3,467,000 cubic feet
November, 1923	7,879,000 cubic feet,

and that no other gas was measured through said measuring station from the date of its construction up to the date of its discontinuance. It is agreed that the first gas was metered through the measuring station constructed at Ash Street and May Avenue by Oklahoma Natural Gas Company to Oklahoma Gas and Electric Company in the month of December, 1924. Wilson & Co. intermittently purchased gas from the Oklahoma Gas and Electric Company for use for fuel under its boilers from the year 1916 or 1917, but did not purchase from the Oklahoma Gas and Electric Company, or use gas as fuel for its boilers, from the 14th day of May, 1923, until it commenced again in December, 1924. It is agreed, however, that from the date of the gate rate order in the year 1921, at or about which time the measuring stations were installed Wilson & Co. purchased gas for miscellaneous incidental purposes at its plant from the Oklahoma Gas and Electric Company during each and every month up until December, 1924, and during some of said months purchased additional supplies of gas for fuel under its boiler plant.

"It is agreed that any of the parties hereto may intro-

duce additional evidence to establish any other material fact or facts."

[fol. 125] The Wilson defendants introduced the following exhibit:

#### EXHIBIT A

A certified copy of the petition and complaint filed by Wilson & Co., Inc. against the Oklahoma Natural Gas Company and Oklahoma Gas and Electric Company with the Corporation Commission in cause No. 7052. (Not recopied herein for the reason that a true copy thereof is attached to complainant's Bill of Complaint as complainant's Exhibit "A".)

#### EXHIBIT B

A certified copy of the findings of fact, opinion, and order known as Order No. 3388 of the Corporation Commission in said cause No. 7052. (Not recopied herein for the reason that a true copy thereof is attached to the complainant's Bill of Complaint as complainant's Exhibit "B".)

#### EXHIBIT C

A certified copy of the notice of appeal to the Supreme Court of the State of Oklahoma, from the Corporation Commission of said State, by the Oklahoma Gas and Electric Company, in cause No. 7052. This was a formal written notice of appeal from Order No. 3388 entered on April 13, 1926, and filed with the Corporation Commission April 22, 1926.

#### EXHIBIT D

A certified copy of the notice of appeal to the Supreme Court of the State of Oklahoma, from the Corporation Commission of said State, by the Oklahoma Natural Gas Company in cause No. 7052. This was a written notice of appeal from said Order No. 3388 stating for grounds of appeal that the order was contrary to the law and the evidence, that it violated section 7, Article 2 of the Constitution of Oklahoma and the Fourteenth Amendment to the



Constitution of the United States in that it would deprive the Gas Company of its property without due process of law and would compel it to perform a service which it had never undertaken or professed to serve, which was so unreasonable as to be tantamount to an appropriation of property without just compensation.

#### EXHIBIT E

A certified copy of a notice by Wilson & Co., Inc., to the Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company of the willingness of Wilson & Co., Inc. of Oklahoma to take over and purchase the present service line owned by Oklahoma Gas and Electric Company and [fol. 126] used for serving Wilson & Co., all as provided for in said Order No. 3388 of the Corporation Commission in said cause No. 7052. In this written notice it is set out that the service line is only about four or five hundred feet in length and that its value can quickly be ascertained, and also setting out that if the line cannot be purchased, that Wilson & Co. would proceed to lay and install, at its own expense, its own service line direct from the supply line of Oklahoma Natural Gas Company on Ash Avenue to the boiler room of said Wilson & Co., as required by the order aforesaid. This notice was filed with the Commission April 23, 1926, and shows service on the two Gas Companies as indicated by the endorsement of their respective attorneys of record, April 19, 1926.

#### EXHIBIT F

A certified copy of Journal Entry No. 1453 of the Corporation Commission of the State of Oklahoma in cause No. 7052, being an order allowing the appeal of the Oklahoma Gas and Electric Company to the Supreme Court of Oklahoma, and fixing the amount of the supersedeas bond in the sum of \$25,000.00. This is a formal Journal Entry, reciting the rendition of Order No. 3388 by the Corporation Commission, directing Oklahoma Natural Gas Company to serve fuel gas direct to Wilson & Co., and setting out that the main line of the Oklahoma Natural Gas Company was within one hundred and fifty yards of Wilson & Co., and

that Wilson & Co. be allowed to connect up with said main line, and requiring that gas be furnished said company for fuel at 35c per thousand cubic feet for the first 100,000 cubic feet, and at 15c per thousand cubic feet for any remaining quantity, provided that the consumption should not be less than 15,000,000 cubic feet for any one month; also setting out that the Oklahoma Gas and Electric Company had, on April 22, 1926, filed its notice of appeal to the Supreme Court of Oklahoma, and applying for supersedeas to stay the effectiveness of said Order No. 3388 pending said appeal. Upon consideration whereof, the appeal aforesaid was allowed and the effectiveness of said Order No. 3388 was ordered superseded upon the filing of a \$25,000.00 bond by Oklahoma Gas and Electric Company, conditioned upon the refunding and repaying unto Wilson & Co., Inc. of Oklahoma, all amounts collected by said Oklahoma Gas and Electric Company for gas in excess of the rate established by said Order No. 3388, together with six per cent per annum interest. It was, therefore, adjudged [fol. 127] that said Order No. 3388 be stayed and superseded upon the filing of said bond. This order was made April 27, 1926.

#### EXHIBIT G

A certified copy of a formal Journal Entry No. 1452 of the Corporation Commission of the State of Oklahoma, in cause No. 7052, dated April 27, 1926, and filed with the Commission which recites the making and entry of its Order No. 3388, by the terms of which Oklahoma Natural Gas Company was required to supply directly to the plant of plaintiff Wilson & Co., Inc. of Oklahoma, natural gas for use by said plant as fuel, at a rate of 35 cents per thousand cubic feet for the first 100,000 cu. ft., and a rate of 15 cents per thousand cubic feet thereafter, until 15 million cubic feet per month had been consumed. This order further recites that on April 23, 1926, defendant Oklahoma Natural Gas Company filed with the Commission its notice of appeal and application for supersedeas; and that it be allowed to supersede said order pending the determination of said appeal. The fourth and sixth grammatical paragraphs of said Journal Entry are as follows:

"The Commission is of the opinion that since the Oklahoma Gas & Electric Company has been permitted to also supersede this same order, and required to post a bond in the sum of Twenty-five thousand Dollars protecting plaintiff in any amounts charged and collected for gas, pending the appeal, in excess of the rate established by said order, that the Oklahoma Natural should also be granted a supersedeas and that since the Oklahoma Natural Gas Company is not at this time supplying plaintiff and will collect no moneys for gas supplied, that a nominal supersedeas bond is all that should be required.

"It is the Further Order of the Commission, that the effectiveness of said Order No. 3388 be and it is hereby stayed pending the final determination of said appeal to the Supreme Court, conditioned upon the filing by the Oklahoma Natural Gas Company within ten days from the date hereof, of a bond in the sum of One Thousand (\$1,000) Dollars, conditioned upon the payment of any damages which may be shown to have resulted to plaintiff herein, from said appeal."

[fol. 128]

#### EXHIBIT H

A certified copy of a supersedeas bond in the sum of \$25,000.00 executed by Oklahoma Gas and Electric Company, as principal, and The Fidelity & Casualty Co. of New York, as surety, payable to Wilson & Co., Inc., filed in said cause No. 7052. (A copy of this bond is attached to defendant's, Oklahoma Packing Company, answer filed herein, marked Exhibit "A", and will not be recopied here.)

#### EXHIBIT I

A certified copy of the additional or supplemental supersedeas bond in the sum of \$15,000.00 executed by Oklahoma Gas and Electric Company, as principal, and the Fidelity & Casualty Co. of New York, as surety, payable to Wilson & Co., Inc., and filed in the Supreme Court of the State of Oklahoma in cause No. 17859 which is the appeal from Order No. 3388 in cause No. 7052 of the Corporation Commission. (A copy of this bond is attached to defendant's, Oklahoma Packing Company, answer filed herein and marked Exhibit "B", and will not be recopied here.)

## EXHIBIT J

A certified copy of the additional or supplemental supersedeas bond in the sum of \$10,000.00 executed by Oklahoma Gas and Electric Company, as principal, and The Fidelity & Casualty Co. of New York, as surety, payable to Wilson & Co., Inc., and filed in the Supreme Court of Oklahoma in said cause No. 17859. (A copy of this bond is attached to defendant's, Oklahoma Packing Company, answer filed herein and marked Exhibit "C", and will not be recopied here.)

## EXHIBIT K

A certified copy of the opinion of the Supreme Court of Oklahoma in cause No. 17859 entitled "Oklahoma Gas and Electric Company, et al., v. Wilson & Co. Inc., et al.," reported in 146 Okla. 272, 288 Pac. 316, which is the appeal from Order No. 3388 in cause No. 7052 of the Corporation Commission. (Since this opinion appears in the official volumes of the Oklahoma Supreme Court Reports, and also in the Pacific Reporter, said exhibit will not be recopied herein but is made part hereof by reference.)

## EXHIBIT L

Copy of letter from the Oklahoma Natural Gas Company, by R. C. Sharp, its Vice-President, to the Corporation Commission of Oklahoma, dated September 12, 1924, which is as follows:

"Corporation Commission Oklahoma City, Oklahoma

Attention of Mr. Frank C. Carter, Chairman

DEAR SIR:

At the conference held yesterday with Commissioners Joe B. Cebb and E. R. Hughes, also the Commission's Attorney, Judge Ratliffe, Henry Wilmering, Auditor, and B. F. Stockwell, Engineer, it was explained to the Commission by Judge Richardson that putting the new industrial rate into effect would have no bearing in any way on your case against the Oklahoma Natural Gas Company, which you have set for



hearing September 17th. This of course, Judge Ratliffe understood thoroughly, as your case would be based on the facts of the past year and not on what may be accomplished in the future.

After the conference was over, Commissioner Hughes stated that he would approve the rates and Commissioner Cobb decided that he would take it under advisement and let us know later in the afternoon or the next morning. This morning he informed us by telephone from Shawnee that he would concur with Commissioner Hughes, and suggested that as you did not attend the conference that I write you a letter setting forth my statements at the conference.

In the first place, why not let the cities and towns of Oklahoma have the benefit of as much of the industrial gas as possible? In one of the Bristow fields the Empire is taking more than three times as much gas as we are, which gas goes to Kansas, where they get a very much higher price for their domestic gas and even a lower price for industrial than we have named. In the southern part of the state, the Lone Star is buying gas from the same field that we are and are taking it to Dallas, Fort Worth and other Texas cities and towns, and are getting 75 cents for domestic gas, with a minimum industrial rate of 16 cents.

We would not for a minute ask to reduce the industrial gas rate were it not to save what industrial trade we now have, as industrial gas is sold in competition with fuel oil, the price of which is very low, due to the depression in the oil market, and it is simply a matter of dollars and cents as to whether a consumer uses oil or gas. We believe that the increased volume of business that we can secure at the reduced prices will exceed our present profit from industrial sales, and it surely will be better to sell what industrial gas we can sell at the prices named in the schedule filed with you September 2nd, than not to sell any.

We realize that it is our duty at all times to give the domestic consumer first call on our service, which, of course, is also a drawback in getting certain industrial consumers as they do not like the idea of possibly having to change any day without notice. We advised the Commission at the conference that we, of course, at all times kept in close touch with our supply and should the supply at any time decrease to where the domestic service was in any danger we would at once discontinue industrial service.

We advised the Commission at the conference that while we had asked permission to make effective September 1st the schedule submitted to you in the form of a letter dated September 2nd, that since the matter had not been passed upon as yet we would like, in case of a favorable decision, to make the rates effective September 15th, that is the first 15 days of September being on the old rate and the last 15 days being on the new rate, as that would be very much easier figured for our distribution plants. This suggestion was also made partly in consideration of the Oklahoma Gas & Electric Company, who advised that as they read meters and bill every day, that it would cause them additional labor and expense to re-bill and rebate back to September 1st.

I believe you understand our position in this matter thoroughly, and those representing the Corporation Commission at the conference seemed to understand it. You realize, of course, that the overhead charges, the property used and useful in serving the domestic consumer go on just the same, whether any industrial gas is sold, and that on account of climatic conditions in this state, where there is really only three months domestic business out of twelve, that it is good business for all concerned to move such industrial gas as possibly can be moved at a profit.

Very truly yours, Oklahoma Natural Gas Company,  
by (Signed) R. C. Sharp, Vice-President"

RCS-O,

[fol. 131]

#### EXHIBIT M

A certified copy of Journal Entry No. 1203 in cause No. 6030 of the Corporation Commission of the State of Oklahoma, which is as follows:

"In the Matter of Rates Charged for Natural Gas for Industrial Purposes Only, by the Oklahoma Natural Gas Company in Its General System and Enid system, Excluding Claremore, Inola and Ramona.

"On the 2nd day of September, 1924, the Oklahoma Natural Gas Company, a public utility engaged in the transportation, distribution and sale of natural gas within the State of Oklahoma, presented its application to the Corporation Commission for authority to amend its present schedule of rates on its general system and Enid system, excluding

Claremore, Inola and Ramona, for natural gas for industrial purposes, by establishment of the following schedule of rates, to-wit:

### "City Gate Rate

"First 100 M. cu. ft. per customer per month 28¢ per M. cu. ft. net.

"All over 100 M. cu. ft. per customer per mo. 15¢ per M. cu. ft. net.

"For the Cities and Towns Served by the Oklahoma Natural Gas Company Directly.

"For the first 100 M. cu. ft., the present domestic rate.

"All over 100 M. cu. ft. per customer per month 18¢ per M. cu. ft.

"For this classification of service, 2¢ per M. cu. ft. shall be charged as a penalty on bills not *payable* on or before ten days after rendition thereof.

"For industries located outside of the corporate limits of the towns and cities served by the Oklahoma Natural using thirty million cubic feet or more per month, at the city gate rate as above.

"It is stated in the application to the Commission that the present industrial consumption of the Oklahoma Natural Gas Company's total output is approximately five per cent, and that the price of fuel oil is such that the company is rapidly losing such industrial consumption as it now has, [fol. 132] and that the object in presenting this application is to increase the industrial sales to the end that same will not be entirely lost to the company and to thus lessen the burden upon the domestic consumer to that extent.

"It is represented that the present supply of natural gas available to the Oklahoma Natural Gas Company is ample; that in the Chickasha gas field, which is probably the largest source of supply in the state, the company is only able to take substantially seven-tenths of one per cent of the gas offered under the contracts with the producers in that territory.

"The Commission on this the 16th day of September, 1924, having the matter under consideration and having conferred with some of the cities affected, together with its own representatives as to the advisability of the action requested, is of the opinion and finds that the relief petitioned

for by the Gas Company should be allowed, and that the industrial rate prayed for in said application should be in all things granted and the schedule of rates submitted, adopted, effective as of September 15, 1924.

"It is therefore the order of the Commission, premises considered, that on and after September 15, 1924, the Oklahoma Natural Gas Company be and it is hereby authorized to put into effect the following schedule of industrial rates for industrial consumers located on its general system and Enid system excluding Claremore, Inola and Ramona, as fellows, to-wit:

#### "City Gate Rate

"First 100 M. cu. ft. per customer per month, 38¢ per M. cu. ft. net.

"All over 100 M. cu. ft. per customer per mo. 15¢ per M. cu. ft. net.

"For the Cities and Towns Served by the Oklahoma Natural Gas Company Directly.

"For the first 100 M. cu. ft., the present domestic rate.

"All over 100 M. cu. ft. per customer per month 18¢ per M. cu. ft.

"For this classification of service, 2¢ per M. cu. ft. shall be [fol. 133] charged as a penalty on bills not paid on or before ten days after rendition thereof.

"For industries located outside of the corporate limits of the towns and cities served by the Oklahoma Natural using thirty million cubic feet or more per month, at the city gate rate as above.

"This rate to be in effect from and after September 15, 1924.

"Done at Oklahoma City this the 16th day of September, 1924.

"F. C. Carter, Chairman; Joe B. Cobb, E. R. Hughes,"



## EXHIBIT N

Copy of an original letter from Oklahoma Natural Gas Company, to the Corporation Commission of the State of Oklahoma, which is as follows:

"Oklahoma Natural Gas Company, Tulsa, Oklahoma  
O. N. G. Co. R. C. Sharp, Vice President

November 22, 1924.

"Corporation Commission, Oklahoma City, Okla.

GENTLEMEN:

In the journal entry which you made the sixteenth day of September, 1924, fixing the price of industrial gas, the eighth paragraph reads as follows:

'For industries located outside of the corporate limits of the towns and cities served by the Oklahoma Natural using thirty million cubic feet or more per month, at the city gate rate as above.'

We have a chance to get three consumers outside of the city limits of Sapulpa (glass works), who could use the service at the rate, but cannot use as much as thirty million feet a month. They use from fifteen to twenty million, but it would take a fifteen million per month limit to get their business. However, the three accounts that we would get there would amount to some 50 million, or thereabout, a month.

"We, therefore, ask you to allow us to take on these three accounts, or reduce the minimum for the system from 30 million, as mentioned in the paragraph quoted, to 15 million. [fol. 134] We also believe that this same condition will develop at other points.

Very truly yours, Oklahoma Natural Gas Company,  
by (Signed) R. C. Sharp, Vice President.

RCS-O.

Endorsements: 6030 O. K. Hughes & Carter, F. C. Carter."

## EXHIBIT O

A certified copy of Journal Entry No. 1239 in cause No. 6030, made by the Corporation Commission of the State of Oklahoma, which is as follows:

"Journal Entry No. 1239—Cause No. 6030.

"(Supplementing Journal Entry No. 1203 of September 16, 1924)

"In the Matter of Rates Charged for Natural Gas for Industrial Purposes Only, by the Oklahoma Natural Gas Company in Its General System and Enid System, Excluding Claremore, Inola and Ramona.

"On the 16th day of September, 1924, the Corporation Commission upon application of the Oklahoma Natural Gas Company, a public utility engaged in the business of the transportation and distribution of natural gas within the State of Oklahoma, wherein an industrial rate lower than that theretofore obtaining, was petitioned for, The Journal Entry in question permitted the Oklahoma Natural to apply a reduced industrial rate in order to secure additional industrial business which it was represented would add to the gross revenues of the Company's business, without adding to operating expense, except for the cost of gas.

"Now on this the 24th day of November, 1924, the Oklahoma Natural Gas Company represents that paragraph eight (8) of said Journal Entry No. 1203, should be modified and changed so as to provide the same rate for smaller quantities of natural gas than that covered by the original Journal Entry. It is suggested that for industries located outside of the corporate limits of the towns and cities served by the Oklahoma Natural that the quantity necessary to be used in order to secure the adjusted rate, should be reduced from 30 million cubic feet or more per month, to a consumption of 15 million cubic feet or more per month; that quantity to take the rate at the city gate as set forth in said Journal Entry. [fol. 135] "The Commission having the matter under consideration, is of the opinion and finds that the modification should be made as suggested and that the rate charged for industries located outside of the corporate limits of the towns and cities served should be for the use of 15 million cubic feet or more per month, the same as the rate charged at the city gate as outlined in said order.

"It is therefore the order of the Commission, premises considered, that for industries located outside of the cor-

porate limits of the towns and cities served by the Oklahoma Natural Gas Company, using 15 million cubic feet of natural gas or more per month, the rate shall be:

"For the first 100,000 cu. ft. per customer per month, 38¢ per thousand cubic feet, net.

"For all in excess of 100,000 cu. ft. per customer per month, 15¢ per thousand cubic feet, net."

"Done at Oklahoma City, this the 25th day of November, 1924.

"F. C. Carter, Chairman; Joe B. Cobb, E. R. Hughes."

#### EXHIBIT P

A certified copy of the Journal Entry of Judgment of the District Court of Oklahoma County, Oklahoma, filed April 6, 1933, in cause No. 71,898, entitled Wilson & Co., Inc., plaintiff vs. Oklahoma Gas & Electric Co., and Fidelity & Casualty Company of New York, defendants. This is a formal Journal Entry, announcing the appearance of the parties, a partial trial to a jury, which was thereafter waived upon agreement that the Court should try the case upon all the issues. After setting forth the findings of fact and the conclusions of law, the Court finds that the plaintiff is entitled to and the Court renders judgment for a sum of money equal to the difference between the amounts paid by Wilson & Co., Inc. of Oklahoma, to the Oklahoma Gas and Electric Company for gas, pending the suspension of said Order No. 3388, and the amount that said Wilson & Co. would have paid for gas at the rate fixed in said Order No. 3388, if said order had not been suspended. The Court accordingly rendered judgment against the Oklahoma Gas & Electric Company and said surety company for the amount sought by Wilson & Co. in the first three counts of its petition in said action, and a [fol. 136] further judgment against the Oklahoma Gas & Electric Company only, as there had been no bonds to cover the amount sought by plaintiff in said fourth count.

#### EXHIBIT Q

A certified copy of a voluntary rate schedule for gas to large industrial users, and applicable to the entire system of Oklahoma Natural Gas Company, filed by said company

with the Corporation Commission of the State of Oklahoma. This establishes a sliding schedule, giving to industries consuming thirty million cubic feet per month a flat rate of 10 cents per thousand cubic feet. This rate effective July 1, 1930, and which exhibit is as follows:

### Defendants' Exhibit "Q"

"Oklahoma Natural Gas Corporation O. C. C. No. 1

4th Revised Sheet No. 3A, Cancelling 3d Revised Sheet

No. 3A; Applies to Entire System Okla.

Large Industrial Gas Service

Available for Industrial Consumers

#### Rates:

First 100 M. Cu. Ft. per mo.	35¢ per M. Cu. Ft.
Next 1,900 M. Cu. Ft. per mo.	15¢ per M. Cu. Ft.
Next 2,000 M. Cu. Ft. per mo.	12¢ per M. Cu. Ft.
Next 6,000 M. Cu. Ft. per mo.	11¢ per M. Cu. Ft.
Next 20,000 M. Cu. Ft. per mo.	10¢ per M. Cu. Ft.

When the gas consumption per month exceeds 30,000 M. Cu. Ft. the rate of 10¢ per M. Cu. Ft. shall apply to all gas consumed during said month.

Special terms & conditions. Service under this rate is subject to discontinuance without notice in case the supply of gas is inadequate to meet domestic demands.

This rate subject immediate discontinuance on cancellation of existing agreements with producers for gas at less than general field prices on main line system.

Issued July 1, 1930. Effective July 1, 1930.

Rates authorized by 2112 4796 (as later modified by voluntary reduction). Issued by Frank M. Long, Vice-President, Tulsa, Oklahoma."

[fol. 137]

#### OFFERS IN EVIDENCE

The defendant, Wilson & Co., then introduced in evidence, all the pleadings in Cause No. 71,898 in the District Court of Oklahoma County, Oklahoma, in which suit Wilson & Co., Inc. of Oklahoma was plaintiff and the Oklahoma Gas and Electric Company and The Fidelity & Casualty Company of New York were defendants, resulting in the judgment shown by Exhibit "P" herein.



The petition of Wilson & Co., Inc. of Oklahoma herein referred to, is set out in full as Exhibit "D" to the bill of complaint herein and is not recopied here but made a part hereof.

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The separate answer of Oklahoma Gas and Electric Company denies each and every material allegation in the plaintiff's petition except such as were specifically admitted, and said answer admits the corporate existence of the parties; admits The Fidelity & Casualty Company of New York is a corporation organized and existing under the laws of the State of New York and authorized to execute the judicial and other forms of bonds within the State of Oklahoma; admits that Wilson & Co., Inc. filed a petition with the Corporation Commission of the State of Oklahoma in Cause No. 7052; admits that the Corporation Commission made its findings of fact and conclusions of laws in favor of Wilson & Co.; admits that it gave notice to the Supreme Court of the State of Oklahoma and applied for supersedeas; it further admits that Wilson & Co. served on Oklahoma Gas and Electric Company its offer to take over and purchase the present service line owned and operated by the Oklahoma Gas and Electric Company on Ash Avenue leading into or near the boiler room of the said Wilson & Co., Inc. of Oklahoma and to pay therefor its reasonable value. (This notice is attached to plaintiff's petition as Exhibit "F". It stated that the line was about 400' or 500' in length and that its value could be quickly and easily ascertained. This notice further requested that Wilson & Co. be advised that day or the next day as to whether the Oklahoma Gas and Electric Company would sell said line, at its fair market value for cash and that otherwise Wilson & Co. would proceed to lay and install its own service line direct from the supply line of the Oklahoma Gas and Electric Company on Ash Avenue to its boiler room in conformity to the order of the Corporation Commission of Oklahoma.) The answer further [fol. 138] admits the execution of each of the three bonds referred to by itself, as principal, and by The Fidelity & Casualty Company, as surety.

The answer further alleged that defendant, Oklahoma Gas and Electric Company, was a domestic corporation and a public utility engaged in the distribution and sale of gas

in the city of Oklahoma City and other cities and towns in the State of Oklahoma; that the Oklahoma Natural Gas Company was also a corporation engaged in the business of the production, transportation and sale of natural gas as a public utility; that on and prior to November 13, 1925, the Oklahoma Gas and Electric Company was the owner of a gas distribution system in the city of Oklahoma City and the vicinity thereof and was engaged in the business of selling natural gas for use as heat and fuel to domestic and industrial consumers, both within and without the city limits of Oklahoma City, which said gas was delivered by the defendant, through its distribution system, to its said consumers at or on the premises of said consumers at rates prescribed by the Corporation Commission of the State of Oklahoma; that the defendant purchased said gas from the Oklahoma Natural Gas Company at city gates or measuring stations outside of the city limits of said Oklahoma City, and paid the Oklahoma Natural Gas Company for said gas the rate fixed by the Corporation Commission of Oklahoma and that said gas so purchased from the Oklahoma Natural Gas Company and transmitted through its lines within the State of Oklahoma to the vicinity of Oklahoma City where it was delivered to the defendant through meters at said city gates or measuring stations; that the manufacturing plant of Wilson & Co. Inc. of Oklahoma at all times hereinafter mentioned was situated in Oklahoma County, without the corporate limits of said city, but immediately adjacent thereto and within the city gates or measuring stations and on the distribution lines of Oklahoma Gas and Electric Company; that on the 13th day of November, 1925, and for a long time prior thereto, Wilson & Co., Inc. purchased gas from Oklahoma Gas and Electric Company at a rate of 68¢ for the first 100,000 cubic feet and 20¢ per thousand cubic feet for all in excess thereof where the consumption amounted to 15,000,000 cubic feet per month, or more, which was the rate fixed by the Corporation Commission and charged all other consumers or purchasers of gas similarly situated.

[fol. 139] The defendant further alleged that the order of the Corporation Commission requiring Oklahoma Natural Gas Company to furnish gas directly to Wilson & Co. was legislative and the order and decision of the Supreme Court of Oklahoma affirming said order of the Corporation Commission was likewise legislative and therefore under

the Constitution and laws of the United States this defendant has the right to have the decision of this court upon both the law and the facts affecting the validity of said order; that said order was null and void in that it required the Oklahoma Natural Gas Company, against its will and over its objection, to supply gas as a fuel directly to Wilson & Co., Inc., when said Oklahoma Natural Gas Company had never professed to furnish gas to it or to any other industrial consumer within the city gates or measuring stations either within or without the city limits of Oklahoma City, Oklahoma, and had not at the time of making said order or at any time prior thereto undertaken or professed to serve Wilson & Co., Inc. with gas or to serve any other consumer similarly situated, and said order constituted an appropriation of private property for public use without just compensation and deprived the Oklahoma Natural Gas Company of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States and of Section 7, Article 2 of the Constitution of the State of Oklahoma.

That said order was also null and void as to the defendant, Oklahoma Gas and Electric Company for the reason that the same purported under heavy fines and penalties which might be visited upon said Oklahoma Natural Gas Company, to require said Oklahoma Natural Gas Company to furnish such gas to said Wilson & Co., Inc. in the place and stead of the same being furnished by defendant, Oklahoma Gas and Electric Company; that the furnishing of such gas by Oklahoma Gas and Electric Company to said Wilson & Co., Inc. was profitable and remunerative to said Oklahoma Gas and Electric Company, and if said order of the Corporation Commission had been carried out from the time of the making thereof, the said Oklahoma Gas and Electric Company would have been deprived of continuing to furnish such gas to Wilson & Co., Inc. subsequent to the making of said order and said Oklahoma Gas and Electric Company would thereby, by reason of said void and invalid order, have been deprived of its property, property rights and [fol. 140] remunerative business without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States, and of Section 7, Article 2 of the Constitution of the State of Oklahoma.

The answer further alleged that prior to and at the time of the making of said order by the Corporation Commis-

sion of Oklahoma there was an oral contract existing between the defendant and the Oklahoma Natural Gas Company, made four or five years prior thereto and extending so long as the defendant should operate its distribution system and purchase gas from the Oklahoma Natural Gas Company, providing that as to consumers of gas within the city gates or measuring stations so situated as Wilson & Co., Inc. with reference to Oklahoma City, said city gates and the respective property of this defendant and Oklahoma Natural Gas Company, that such consumers would be supplied and furnished gas by Oklahoma Gas and Electric Company and would not be furnished and supplied gas by the Oklahoma Natural Gas Company, and that therefore said order of the Corporation Commission was further illegal, invalid and void as impairing, or attempting to impair, the rights and obligations of and under said contract between Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, and the contract and contractual relations existing between the said corporation and said Wilson & Co., Inc. whereby gas was being sold and furnished to said Wilson & Co., Inc. by the Oklahoma Gas and Electric Company, all contrary to and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States and of Section 10, Article 1 of the Constitution of the United States, and of Section 7, Article 2 of the Constitution of the State of Oklahoma. The answer further alleges that plaintiff is not entitled to recover, because Oklahoma Natural Gas Company never made or filed the \$1,000.00 bond required of them by the Corporation Commission.

For its separate answer, The Fidelity & Casualty Company of New York adopts the answer of the defendant, Oklahoma Gas and Electric Company above.

For reply, after a general denial, plaintiff, Wilson & Co., alleges that under the gate-rate order No. 1886, separate spheres of service to be furnished by the two gas companies were marked out and defined, that is, Oklahoma [fol. 141] Natural Gas Company was authorized to furnish and deliver supplies of gas to be measured to the Oklahoma Gas and Electric Company at the city limits, the last named company was to pay for such gas at that point and was



to have exclusive right to distribute the same within the municipality; that Wilson & Co. has always been far beyond and outside the city limits of Oklahoma City; that its boiler-room lies only about three hundred feet north of Ash Avenue, along the north side of which there runs the high-powered six-inch gas supply line owned by the Oklahoma Natural Gas Company, and that if in fact that the two gas companies at the time of the adoption of Order No. 1886, entered into an agreement among themselves, attempting to parcel out for service patrons living beyond the city limits whereby plaintiff's assignor in Oklahoma City, so situated, was to be served by the Oklahoma Gas and Electric Company, then such an agreement was void and against public policy, and that if such contract contemplated the service of the Oklahoma company by the Oklahoma Natural Gas Company, then the latter company ought to have taken over and served said Wilson & Co. at the lawful rates then applicable. Plaintiff avers however that such an arrangement was a mere pretense, and for the sole purpose only of allowing the largest and most favored patron of the Oklahoma Natural Gas Company, to-wit: the Oklahoma Gas and Electric Company, with the outlay of only a few hundred dollars, to exact from the Oklahoma company approximately Forty Thousand Dollars a year, in excess of the legal rate for gas, and in excess of the price which other patrons similarly situated were furnished gas in like quantities by the Oklahoma Natural Gas Company, and that this agreement was illegal, discriminatory, unconscionable, and against public policy. Plaintiff alleged that it did not take over the short service line, or parallel the same, but it made an effort to do so, only to discover that Oklahoma Gas and Electric Company had suspended and superseded and appealed Order No. 3388 to the Supreme Court of the State of Oklahoma.

The Complainants introduced the following testimony and exhibits:

#### Testimony of Robert W. Hendee

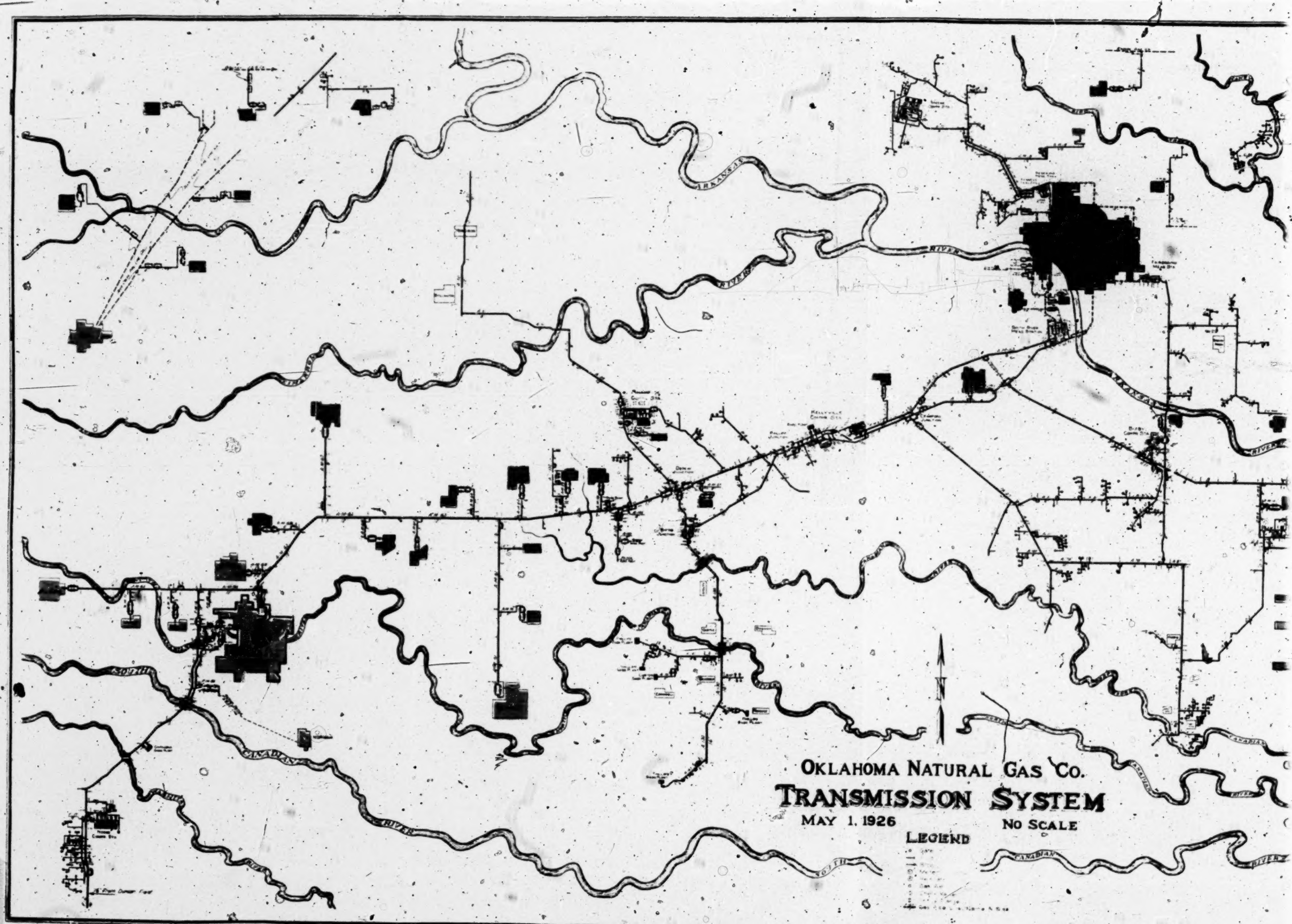
MR. ROBERT W. HENDEE, a witness for complainants, testified that he was president of the Oklahoma Natural Gas [fol. 142] Corporation and resided at Tulsa, Oklahoma; that his first connection with the Oklahoma Natural Gas Company began in 1921; that he was familiar with the transmission systems and the distribution system operated

by the Oklahoma Natural Gas Company in the years 1925 and 1926; witness then identified the map marked for identification as complainants' Exhibit No. 2, and stated that it was a no scale map showing the lines of the Oklahoma Natural Gas Company as of May 1, 1926; that it also showed the cities and towns served; that the black lines on the map represented the main transmission system lines; that the cities and towns marked in red represented gas distribution plants operated by the Oklahoma Natural Gas Company as of May 1, 1926; that the cities and towns marked in blue represented the distribution plants operated by the Oklahoma Gas and Electric Company at that time; that the two companies were separate and distinct corporations; that the cities and towns marked in green represented gas distribution plants operated at that time by other distribution companies but served at the gate by the Oklahoma Natural Gas Company; that the same condition existed during the year 1925.

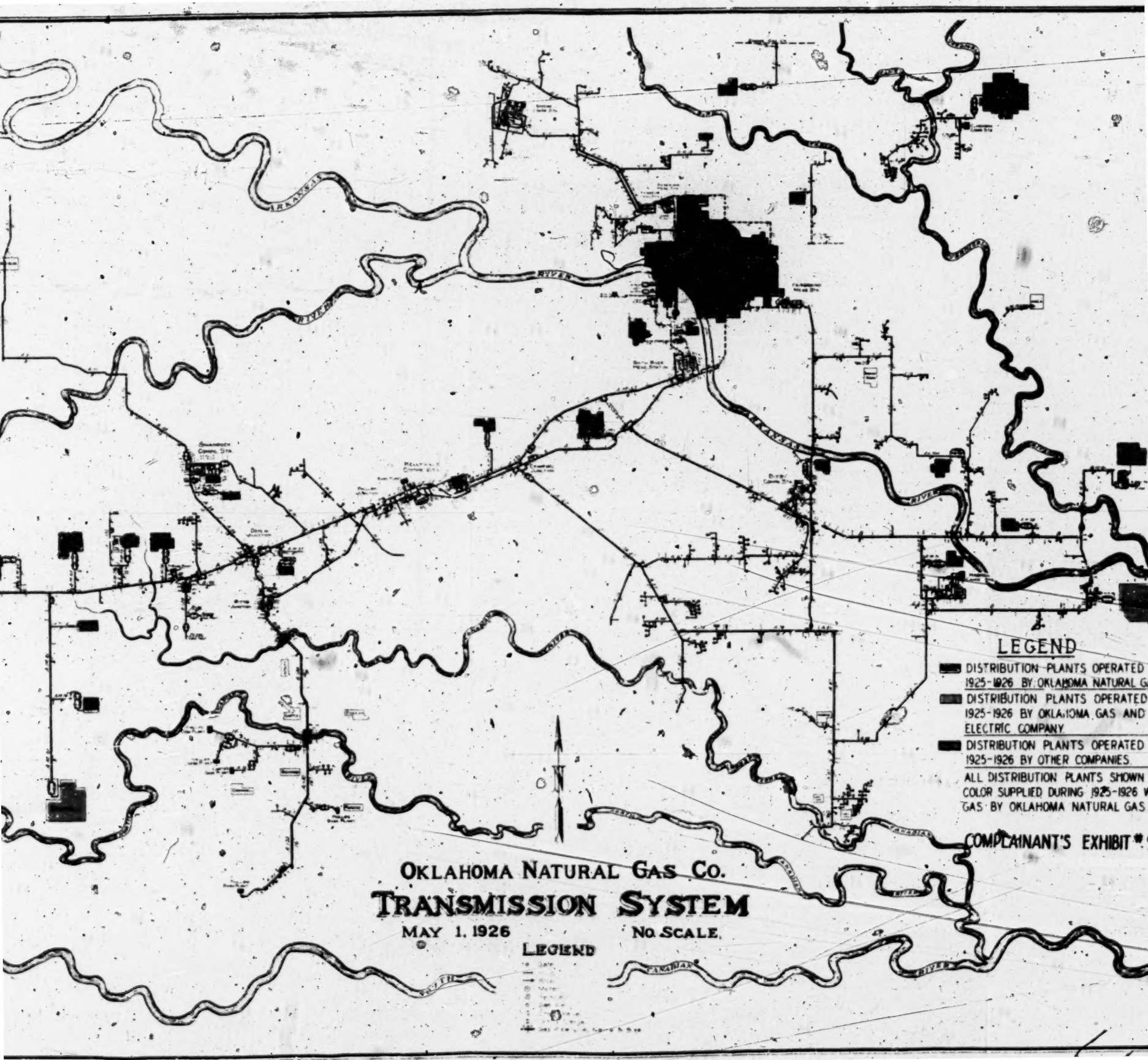
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(Here follows one photolithograph, side folio 143)









## [fols. 144-145] Testimony of Logan W. Cary

LOGAN W. CARY, a witness for complainants, testified that he had no connection with the Oklahoma Gas and Electric Company at this time but that he was gas superintendent for said company from 1919 to July 28, 1928, and that he was familiar with the gas distribution system of the company during said time; that complainants' Exhibit No. 3 is a map representing the medium pressure system of the Oklahoma Gas and Electric Company and main line of the Oklahoma Natural Gas Company supplying Oklahoma City; that the red lines show the Oklahoma Natural Gas Company's gas system going around the city and the green lines the medium pressure lines of the Oklahoma Gas and Electric Company, through which gas was usually distributed under fifty pounds to various points throughout the city to what are called the gas regulator stations which are in the nature of pressure transformers and reducers and that the low pressure lines are connected with these regulator stations; that the map also shows some lines colored in yellow that were originally owned by the Oklahoma Gas and Electric Company which were removed after gas came in from the southern part of the state.

That the black lines, to the right of Wilson & Co.'s plant, are the low pressure lines of the Oklahoma Gas and Electric Company's distribution system in that vicinity used to supply domestic consumers; that there are low pressure lines in each alley and street in the city but this map shows only that small district; that the little green dot at the end of the arrow is a regulator and in the electric system would be a transformer station. The pressure in the Oklahoma Natural Gas Company's supply lines varied from 350 pounds down, and at and prior to the making of the gate rate order the Oklahoma Natural Gas Company had only two regulator stations in the vicinity of Oklahoma City, one at the intersection of 36th and Santa Fe Streets, at which regulator stations the pressure of the gas was reduced before passing into the distribution lines of the Oklahoma Gas and Electric Company, and Wilson & Co. was then receiving its gas through these stations. The large red dot marked "A" on the north side of the map (Exhibit 3) represents the regulator station at 36th and Santa Fe Streets and the large red dot in the southwest portion of the map,

[fol. 146] marked "B", represents the regulator station at Reno and Pennsylvania.

After the taking effect of the gate rate order meters were placed at the regulator stations A and B and the gas was thereafter measured and paid for on a volume basis.

The other large red dot farthest to the southwest corner of the map, marked "C", represents the regulator and metering station that was established in December, 1924, at May and Ash Avenues. At that time and long prior thereto Wilson & Co. was using small quantities of gas which came through the regulator and measuring stations at 36th and Santa Fe and at Reno and Pennsylvania, but was not using gas for fuel under its boilers. During the summer months the station at Reno and Pennsylvania was shut down and all the gas came into the Oklahoma Gas and Electric Company's distribution system from 36th and Santa Fe, but during the winter months both stations were open and in cold weather gas entered the Oklahoma Gas and Electric Company's system from the north through these two stations and went south through the eight inch line on Pennsylvania Avenue (represented in green on the map) to Wilson & Co.'s plant, and Wilson & Co. received all of its gas through these stations.

Wilson & Co. was using gas as a fuel under its boilers at the time of the making of the gate rate order in June, 1921, and had used gas intermittently for fuel under its boilers from 1916 until December, 1924, when the regulator and measuring station was established at point C, but at that time it was not using gas for fuel under its boilers and had not been for some time. That witness's recollection is that for almost two years Wilson & Co. had been offered gas by the Oklahoma Gas and Electric Company. There was a change in the price of fuel and Oklahoma Gas and Electric Company convinced Wilson & Co. that it could burn gas cheaper than other fuel and it agreed to purchase gas for fuel under its boilers. Prior to that time Wilson & Co. had been served from the line shown in front of the plant and through a line that ran down between the property of Wilson & Co. and Morris & Co. This line had been idle for between one and two years so the Oklahoma Gas and Electric Company made a pressure test of it with an air compressor and found that the line was in such condition that there was no showing whatever on the pressure gauge. This line ran right on the property line of Wilson

[fol. 147] & Co. between Wilson & Co.'s plant and Morris & Co.'s plant and between a cooling tower and fence underneath pavement in the front which made it expensive and difficult to replace and it being on Wilson & Co.'s property the Oklahoma Gas and Electric Company did not feel like replacing it.

There was an unusually big flood in 1923 and all of the river crossings of the Oklahoma Natural Gas Company's lines south and west of the city went out and that company ran a six inch emergency line over through Packingtown and connected with the medium pressure system of the Oklahoma Gas and Electric Company in the alley just off Agnew and set a temporary meter on the regulator station at that point and the Oklahoma Gas and Electric Company backfed through the line up past Reno and Pennsylvania during the emergency until the flood was over. When Wilson & Co. decided in the fall of 1924 to again use gas for fuel under its boilers the Oklahoma Gas and Electric Company in order to save the expense of renewing this line on Wilson & Co.'s property asked the Oklahoma Natural Gas Company if it had any objections to the Oklahoma Gas and Electric Company serving Wilson & Co. from this temporary line on the south side of Wilson & Co.'s plant. The Oklahoma Natural Gas Company agreed to this plan and we agreed to install a measuring station on the south side of Wilson & Co.'s plant, and the Oklahoma Gas and Electric Company purchased from the Oklahoma Natural Gas Company that part of the emergency line shown in red from a point immediately south of Wilson & Co.'s plant running east on Ash Avenue to the alley west of Agnew and thence north to the regulator station opposite Hickory Street. The agreement between the Oklahoma Gas and Electric Company and Wilson & Co. for Wilson & Co. to resume burning gas for fuel under its boilers was oral and made between the witness and the superintendent of Wilson & Co. The agreement between the Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company about placing the meter south of Wilson & Co.'s packing plant was not in writing. When the gate rate order was made in 1921 this red line was there but the regulator station was in the alley west of Agnew at the point indicated on the map. It was an emergency station.

The Oklahoma Natural Gas Company was unable to pro-



[fol. 148] cure a site for a regulator and metering station south of Wilson & Co.'s plant and it established a regulator station and installed a meter at May and Ash Avenues (Point marked C on Exhibit 3). The Oklahoma Gas and Electric Company thereupon made a verbal agreement with the Oklahoma Natural Gas Company whereby the former should purchase the portion of the emergency line east of the new measuring station to the point of connection south of Wilson & Co.'s plant with that part of the emergency line it had already purchased and paid for and said line was turned over to the Oklahoma Gas and Electric Company and thereafter it was used and maintained by the Oklahoma Gas and Electric Company.

Thereafter the gas passed from the Oklahoma Natural Gas Company's transmission lines into the distribution system of the Oklahoma Gas and Electric Company at point C where the pressure was reduced and the gas was metered, and the Oklahoma Gas and Electric Company supplied Wilson & Co. with gas that came in through this line. When the measuring station was discontinued at Agnew and the one established at point C a new building was erected, but witness does not know whether the same meter was used. No complaint was made by Wilson & Co. until it filed its complaint before the Corporation Commission.

The Oklahoma Gas and Electric Company's distributing system extends around Oklahoma City in many directions and was designed to serve consumers in the vicinity or community of Oklahoma City as well as customers within the city limits and for a long time all the gas supplied consumers on the Oklahoma Gas and Electric Company's distribution system, including Wilson & Co., came into its system through the stations at 36th and Santa Fe and Reno and Pennsylvania, and Packingtown was at the far end of the distribution system.

When the gate rate order was established in 1921 the Oklahoma Gas and Electric Company had customers beyond the measuring stations at Reno and Pennsylvania and 36th and Santa Fe and owned the meters and lines serving same.

The Oklahoma Gas and Electric Company laid lines of sufficient size to serve all the load in the Packingtown district long before there was any gas coming from the south at all and did serve that district. It had many customers [fols. 149-150] within that district, both within and without the city limits of Oklahoma City. It used to serve Morris &

Co. as well as Wilson & Co. and the Coliseum and some mule barns over there, all of which were outside of the city limits.

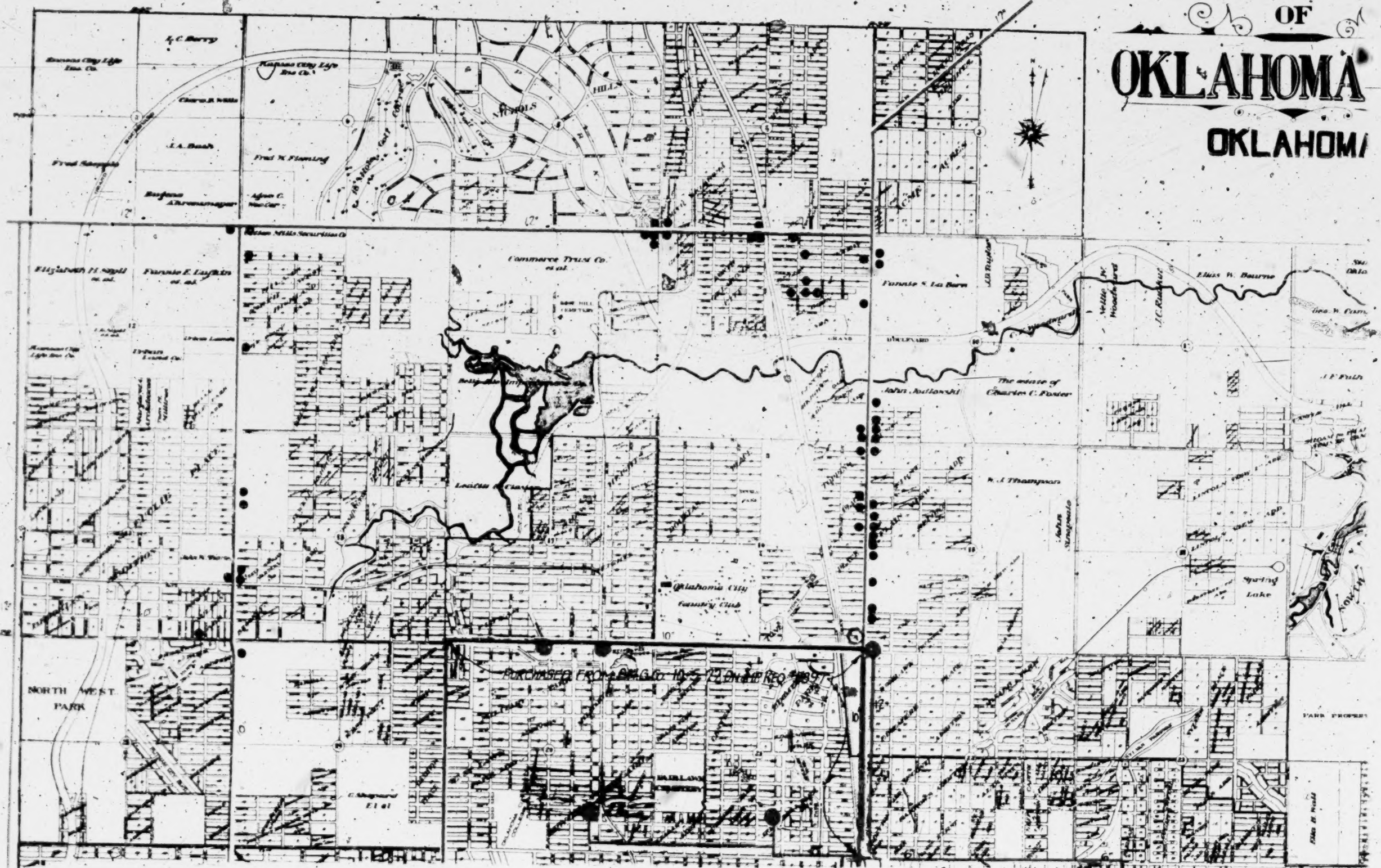
Mr. Cary identified complainants' Exhibit 4 and stated that it was substantially correct and showed the high pressure lines of the Oklahoma Natural Gas Company and the medium pressure lines of the Oklahoma Gas and Electric Company as they existed at the time of the application for the order that was made in this case in April, 1926, and witness further stated that the low pressure lines as shown on the map are about the same as they were in 1926.

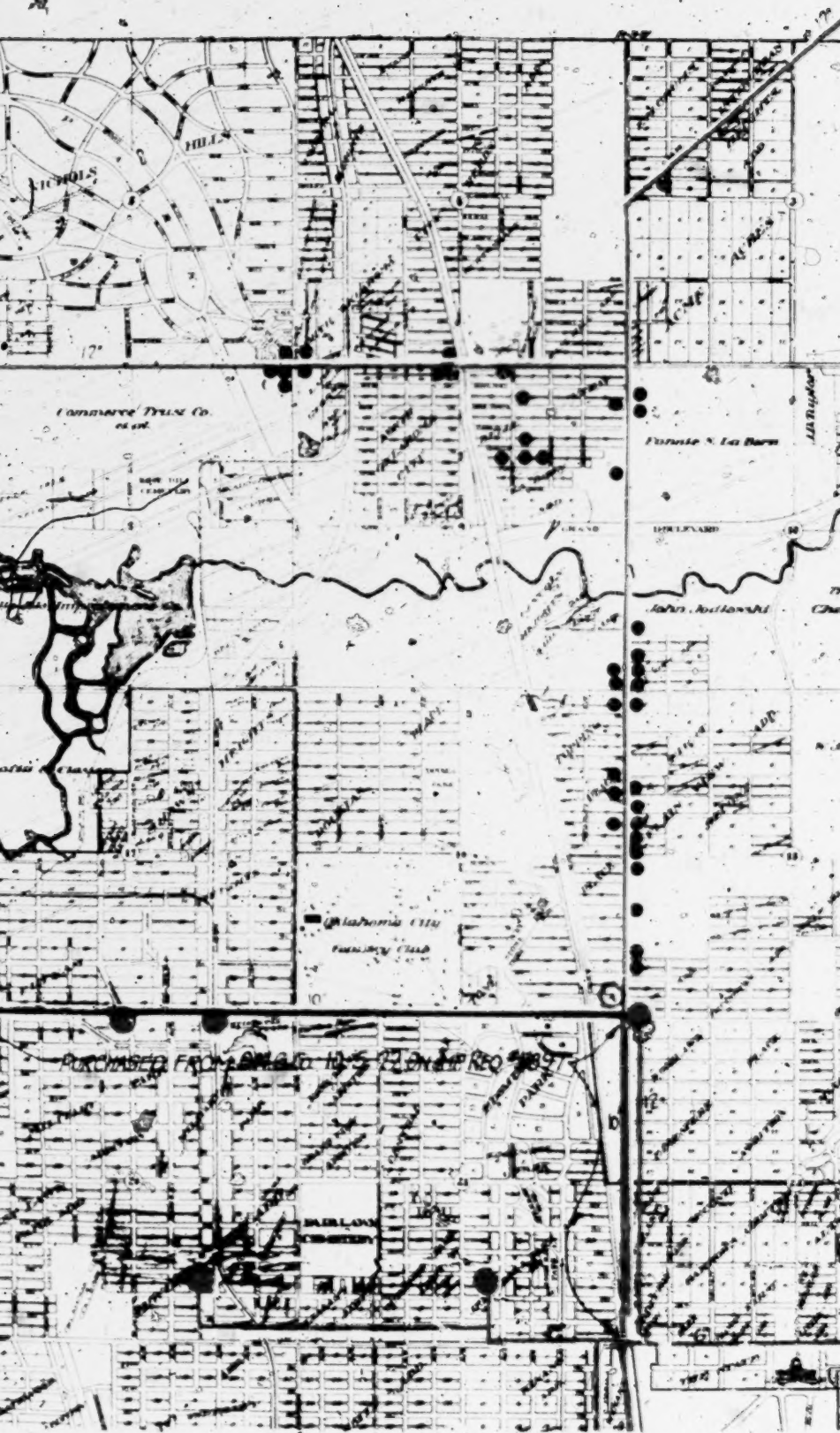
(Here follow two photolithographs, side folios 151 and 152)





MAP  
OF  
**OKLAHOMA**  
OKLAHOMA





Commerce Trust Co.  
ex. et.

Plaza S. La Borne

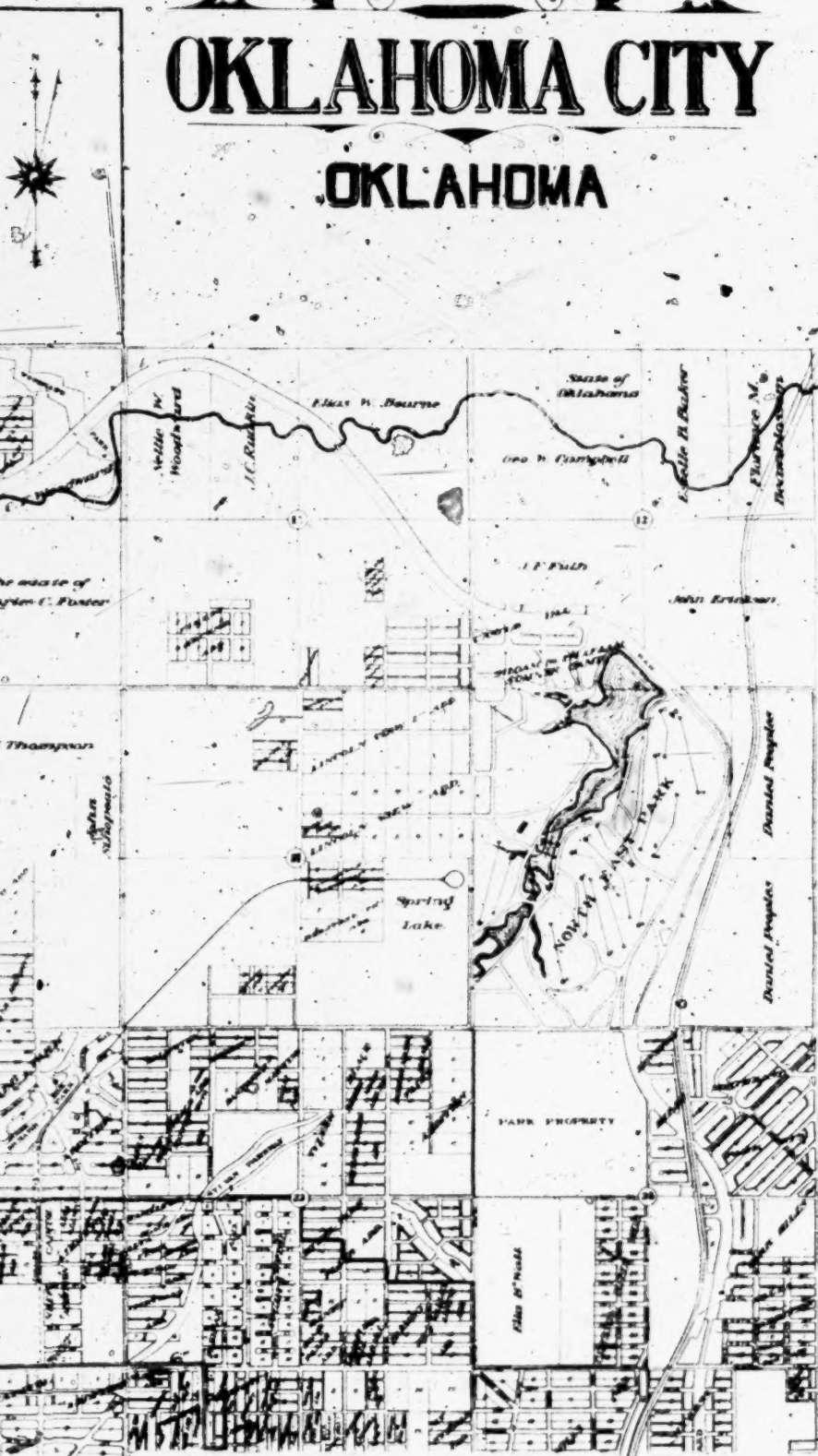
Plaza S. La Borne

Plaza S. La Borne

Oklahoma City

PURCHASED FROM BLM 12-5-12 ON APREQ 1897

# MAP OF OKLAHOMA CITY OKLAHOMA







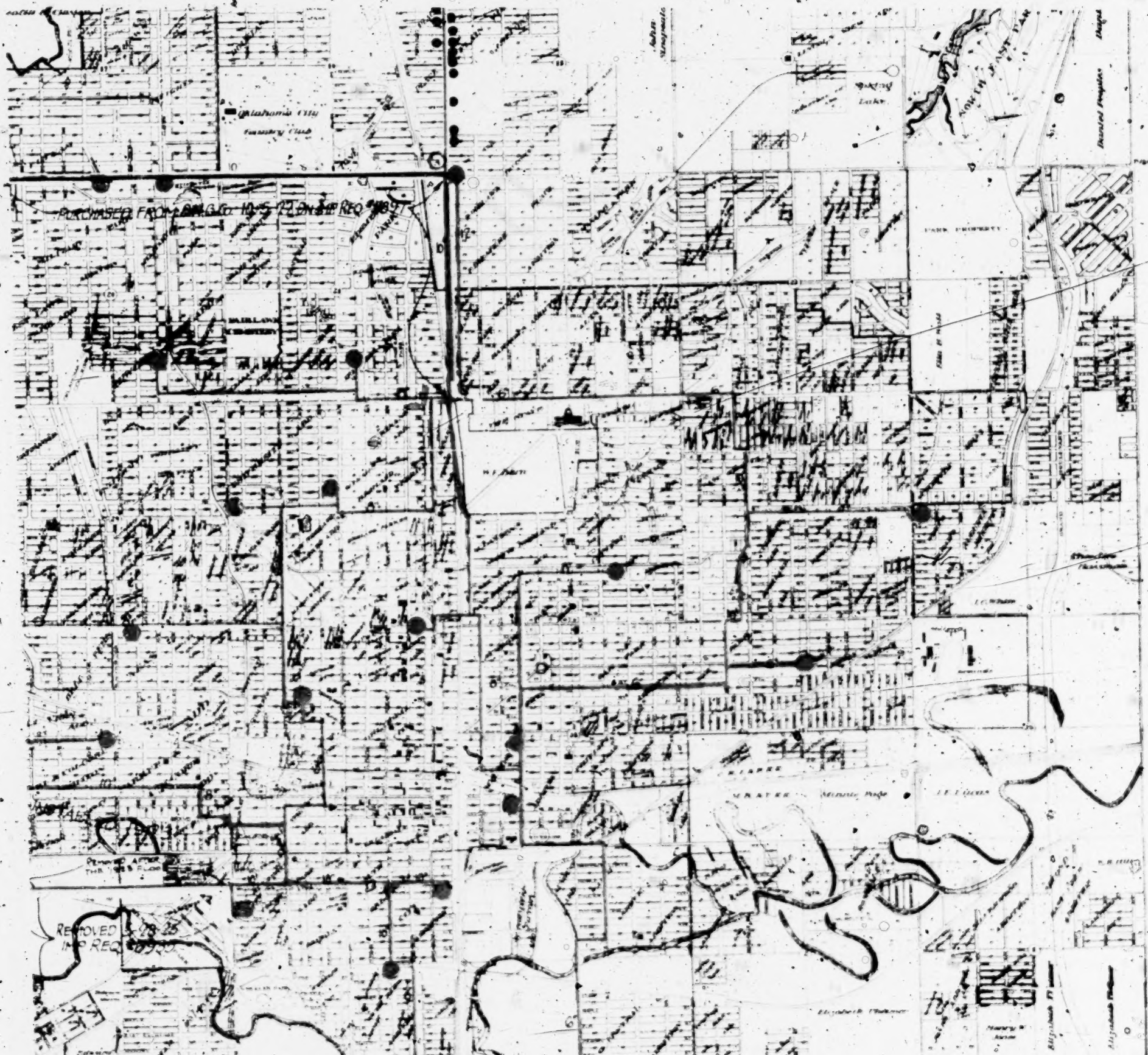
Purchased from the City of New York  
to the South of the 10th St. to the East of the 10th St.  
1911

REMOVED 1911  
1911

SOUTH WEST  
PARK





















[fol. 153]

## Testimony of R. C. Sharp

MR. R. C. SHARP, a witness for complainants, testified that he was a resident of Tulsa, Oklahoma, and Vice-President in charge of the business policies of the Oklahoma Natural Gas Company until he resigned in January, 1928; that from 1920 until September, 1926, he was in charge of the business policies of the company; that perhaps half of his time was spent in the East but that he made all of the recommendations to the Board of Directors who held their meetings in Pittsburgh, Pennsylvania. That Oklahoma Natural Gas Company was engaged in the business of producing, transporting and selling natural gas at wholesale to distribution companies that held franchises and owned and operated distribution systems in various cities and towns within the State of Oklahoma and that the Oklahoma Natural Gas Company also held franchises and owned and operated distribution systems in about thirty cities and towns in said state.

That in September, 1926, the Oklahoma Natural Gas Company transferred all of its properties, including its franchises, to the Oklahoma Natural Gas Corporation, which succeeded to the business of the former, and the old company was dissolved.

That the Oklahoma Gas and Electric Company, which had franchises and owned and operated the gas distribution systems in Oklahoma City, Muskogee, Edid, Shawnee and in various other cities and towns of the State of Oklahoma and the vicinities thereof, at all times purchased all of the gas distributed and sold to its customers from the Oklahoma Natural Gas Company and its successor, Oklahoma Natural Gas Corporation, and that prior to the taking effect of the gate rate order made by the Corporation Commission of Oklahoma in June, 1921, the Oklahoma Natural Gas Company delivered the gas that it sold to the Oklahoma Gas and Electric Company and to other companies into the city distribution systems of said companies. After reducing it from high pressure to low pressure through regulator stations the local distribution companies would sell and distribute the same to its consumer customers. That the local distribution companies furnished the organization and facilities for the selling, distributing and delivering of the gas and collected the sale price from their consumers and that the amount paid for said gas by the Oklahoma Gas and

[fol. 154] Electric Company under a written contract between said companies was based upon a percentage of the collections made by the Oklahoma Gas and Electric Company, to-wit, one-third of the collections for gas sold to domestic consumers and one-fourth of the collections for gas sold to industrial consumers. That under the terms of said contract the Oklahoma Gas and Electric Company had the privilege to serve and did serve all consumers it desired to serve within a radius of five miles from Oklahoma City and the other cities and towns where it operated.

That in June, 1921, the Corporation Commission of the State of Oklahoma entered what is known as "the gate rate order" dissolving the percentage contracts theretofore existing between the Oklahoma Natural Gas Company and the local distribution companies and providing that thereafter the gas sold by the Oklahoma Natural Gas Company to said distribution companies should be measured before passing into the local distribution systems and paid for on a volume basis at a designated price per thousand cubic feet.

(Note: Counsel for appellants-defendants and counsel for complainants-appellees were unable to agree upon a narrative summary of a part of the evidence of the Witness, R. C. Sharp, and for that reason the Court directed that the following questions propounded to and the answers returned by the said witness be incorporated in this statement of the evidence.)

In this connection, the witness further testified:

Q. When the gate rate order went into effect were measuring stations or metering stations constructed near Oklahoma City for the purpose of measuring gas?

A. Yes, sir.

Q. Where were those located approximately and how were they located, Mr. Sharp?

A. They were located at a distance outside of the city, for the reason that we didn't want the Oklahoma Gas & Electric Company to have any connections back of our city gate measuring stations.

Q. What was the practical reason for that?

A. Well, we didn't want them to serve anyone outside of our stations, outside of our city gate stations, and we didn't want to serve them because it was too much of an expense to keep a man to look after domestic customers and they



[fol. 155] were as a rule served at a loss, and it would cause more leakage to have taps on the main line. We tried to keep the main line as clear as possible up to the station.

Q. Would the Oklahoma Natural Gas Company have been paid for gas unless it was metered or measured through the measuring stations?

A. No, you would not have any record except their customer record.

Q. After the establishment of the metering or measuring stations generally, as you have testified, did the Oklahoma Natural Gas Company ever serve or hold itself out as ready to serve any customers located inside those metering stations?

A. Not to my knowledge, no, sir.

Q. You had general charge of the Oklahoma Natural Gas Company's business?

A. Yes, sir.

Q. You would have known it if any such persons had been served inside the metering stations?

A. Yes, there could have been a chance of some consumer being put on, but I never knew of any, and the orders were not to put any on.

Q. Who operated the distribution systems inside the metering stations?

A. Oklahoma Gas & Electric Company at Oklahoma City and Enid and there were some other towns.

Q. Did you know, Mr. Sharp, from about the year 1920 up until September, 1926, generally of the location of the packing plant belonging to Wilson & Company near Oklahoma City?

A. In a general way, along with the other packing plants. I knew where packing town was.

Q. Did the Oklahoma Natural Gas Company ever serve any industry, to your knowledge,—strike that question. Did the Oklahoma Natural Gas Company ever serve natural gas to Wilson & Company's plant?

A. Not to my knowledge.

Q. Did the Oklahoma Natural Gas Company ever serve any industry, to your knowledge, around Oklahoma City or around any other city or town where the Oklahoma Gas & Electric Company operated the distribution system?

A. Not to my knowledge.

[fol. 156] Q. Located within the metering stations?

A. No, sir.

Q. Did the Oklahoma Natural Gas Company serve industries during the years 1924, 1925, and up to September, 1926, located in or around cities and towns in which it operated the distribution systems?

A. Yes, sir.

Q. What companies or industries, as you now recall, were served with gas in various cities and towns where the Oklahoma Natural Gas Company had the distribution system, or from the main line near those towns, during those three years?

A. Well, we were very anxious at that time to sell as much gas as possible, and could not afford to sell it for less than the wholesale price, but with the cities and towns that we could—that is the main line customers—we took them on as main line customers at the wholesale rate. There was, I believe, the Sunflower Glass Company, at Sapulpa; the Sapulpa Refining Company, and the Collins Glass Company.

Q. That is at Sapulpa?

A. At Sapulpa. There may have been one or two others there. And then at Tulsa there was the Cosden refinery, and I am not sure but what the Producers & Refiners.

Q. Those refineries were located in West Tulsa?

A. The latter two were, yes, sir.

Q. Did the Oklahoma Natural Gas Company own and operate under a franchise the distribution system in the city of Tulsa and West Tulsa during those years?

A. Yes, sir.

Q. Did it own and operate the distribution franchise in the city of Sapulpa during those years?

A. Yes, sir.

Q. What was the policy, Mr. Sharp, of the board of directors of the Oklahoma Natural Gas Company, and the executives in charge of that policy, during the years 1920 up to September, 1926, with respect to the service of natural gas direct to industrial consumers?

A. That all depended on the amount of gas that we had to serve. After the Chickasha field was opened up we then had gas there that we could furnish to Oklahoma City and we could take the Beggs gas and the Cushing gas and bring [fol. 157] it this way, for Tulsa and cities and towns between here and those points.

Q. Well, what was the business policy of the Oklahoma Natural Gas Company during those years with respect to serving industrial customers in communities where it did not operate the distribution plants?

A. We did not serve them and did not want to serve them.

Q. Did the Oklahoma Natural Gas Company ever hold itself out as being ready to serve, or did it ever profess to serve industrial consumers or domestic consumers in communities other than those where it operated the distribution systems or where it was under some legal liability, on account of crossing private premises, to serve?

. . . . .

A. No, sir.

. . . . .

On cross-examination, among other things the witness testified:

Q. Now, Mr. Sharp, you say that the Oklahoma Natural Gas Company furnished industrial gas to the Sunflower Glass Company at Sapulpa. Now, what rate did they charge that company during the period 1924 to 1926?

A. Whatever the rates are on file with the Corporation Commission.

Q. You as trustee of the Oklahoma Natural Gas Company and one of the complainants in this case have in your possession the records of that company showing what rates were charged to those companies, haven't you?

A. I don't know what records they have.

Mr. Rainey: If it will facilitate it, we will admit for the purpose of the record that they did charge the rates that were on file with the Corporation Commission.

Mr. Brown: Wait. Will you admit, though, Mr. Rainey, that the rates charged between 1924 and 1926 to the Sunflower Glass Company, Sapulpa Refining Company, Collins Glass Company, Cosden Refining Company, and the Producers Refining Company, was thirty-five cents per thousand cubic feet for the first one hundred thousand cubic feet furnished to each of these companies and fifteen cents [fol. 158] per thousand cubic feet for all over that quantity if they used more than fifteen million cubic feet per month?

Mr. Underwood: You had better specify the time.

Mr. Brown: Between 1924 and 1926.

Mr. Underwood: Between September 13, 1924.

Mr. Brown: All right, sir.

Mr. Underwood: I assume that you limit it to that date?

Mr. Brown: That is quite all right.

Mr. Underwood: To September, 1926.

Mr. Brown: That is all right.

Mr. Underwood: We will admit that an industrial consumer whose consumption came within the large industrial bracket in the cities and towns where the Oklahoma Natural Gas Company owned and operated the distribution systems was served at the rate on file with the Corporation Commission.

Mr. Brown: Well, do you admit that the rate was thirty-five cents per thousand cubic feet for the first one hundred thousand cubic feet and fifteen cents per thousand cubic feet for all gas over one hundred thousand cubic feet if the consumption was more than fifteen million cubic feet per month?

Mr. Underwood: Yes, we admit that during that time, in the cities of Sapulpa and Tulsa where the Oklahoma Natural Gas Company owned and operated the distribution system and was operating under a franchise. We admit that in so far as it is competent. We don't mean that we are admitting that the testimony is competent.

By Mr. Brown:

Q. Now, Mr. Sharp, these rates, these industrial rates that were in effect by the Oklahoma Natural Gas Company during 1924 and 1926 were available to all industries that were without the limits of any of the towns that were served in Oklahoma if they were on your main line, is that correct?

A. Yes, sir.

Q. Now, Mr. Sharp, one of those towns was Arcadia. I want to ask you where Arcadia is located with reference to Oklahoma City?

[fol. 159] A. I think it has been years since I heard of that town. It is between Oklahoma City and Enid, is it not?

Q. As a matter of fact, it is in Oklahoma County, is it not?

A. I don't remember the location of Arcadia.



Q. Well, you do know, do you not, that the Wilson & Company packing plant was not located in Arcadia, do you not?

A. Yes, sir, I know that.

Q. You also know, do you know, that it is not located within the confines of any one of the cities where the Oklahoma Natural Gas Company served gas, do you not?

A. Yes, sir.

Q. Mr. Sharp, do you know where Luther is located, whether that is in Oklahoma County?

A. I know it is in the vicinity of Oklahoma City, but I don't know whether it is in Oklahoma County or not.

Q. Well, it is a little nearer to Oklahoma City than Arcadia, is it not?

Mr. Underwood: The witness has answered that he didn't know exactly the location of it.

A. I don't know.

By Mr. Brown:

Q. Do you know whether the city or town of Edmond is in Oklahoma County or not?

A. I do not, but I know where it is located.

Q. It is near Oklahoma City, is it not?

A. Seven or eight or ten miles from there. I have gone through there several times.

Mr. Rainey: It is twelve miles.

A. Twelve miles.

By Mr. Brown:

Q. Wilson & Company's packing plant isn't located within the confines of that city or town, is it?

A. No, sir.

Q. Were there any industries located at either Arcadia, Luther, or Edmond that were served gas by the Oklahoma Natural Gas Company during the period 1924 to 1926?

A. I don't remember.

Q. You don't know whether there were or were not?

A. I don't know.

Q. But if they were served they were served on this schedule [fol. 160] of thirty-five cents for the first one hundred thousand cubic feet and fifteen cents for all over that, if they used fifteen million cubic feet or more per month?

A. Whatever the rates were; if they were outside the cities where the Oklahoma Natural Gas Company served direct, they would be served.

Q. So that whether you had a franchise or not in Oklahoma City hasn't anything to do with whether you were authorized or empowered or had undertaken to serve gas to the Wilson & Company packing plant, does it?

A. Well, before the city gate rate—

A. Well, we didn't profess to serve any—

A. We didn't profess to serve any industries, domestic or industrial consumers, within a radius of five miles of the city limits. That was under an understanding with the Oklahoma Gas and Electric Company and in order to endeavor to give the best service possible, which could not be done unless the working arrangements between the Oklahoma Natural Gas Company and such company as was distributing was absolutely cooperating.

Q. Mr. Sharp, following the promulgation of the gate rate order by the Corporation Commission of the State of Oklahoma, it became necessary to make certain adjustments in order to conform to the service of the various patrons that had been served formerly either by yourselves, the Oklahoma Natural Gas Company, as well as those who had been formerly served by the Oklahoma Gas and Electric Company? That is right, isn't it?

A. I believe later on—You will remember that the Oklahoma Gas and Electric Company appealed from the Corporation Commission order of the city gate, and I believe that ran along six or eight months and then during that time we had several conferences where we had the option of taking over any customers that they had had outside of the location of our city gate stations and the material, but if their physical property was not what we wanted to use or thought that we could put in our own material in a better way, there was no obligation to take that.

[fol. 161] Q. Now, Mr. Sharp, that arrangement was made, as I understand it, so that you would take over any property that lay outside the city gates or the city limits?

A. That had formerly belonged to the—

Q. Oklahoma Gas & Electric Company, and also serve those consumers?

A. We could if we desired to.

Q. You say it was optional?

A. Yes, sir.

Q. Anyway that was the arrangement, that you were to take them over and serve them if you wanted to?

A. Yes, sir, that is right.

Q. You say now you had the right to not serve them if you wished not to?

A. We didn't have to take the physical property.

Q. I am talking about the patrons.

A. We agreed with the Corporation Commission to take on the consumers that they had been serving.

Q. That was outside the city limits, wasn't it?

A. Well, outside of the city gates, yes, sir.

The witnesses' testimony before the Corporation Commission was referred to and then he was further cross-examined, as follows:

Q. I will ask you if you didn't swear to this, Mr. Sharp. That under that oral agreement that you had with the Oklahoma Gas and Electric Company that you thought that you had the right to take over and serve Wilson & Company?

A. I don't remember.

Q. Do you deny that?

A. I don't deny it; I said I don't remember.

Q. Don't you remember that at all?

A. No, I don't.

Q. Don't you remember saying that in substance?

A. I wouldn't say that it was not true. I don't remember however.

Mr. Rainey: Judge if it will help you any,—

Mr. Bennett: I don't want to be helped, I can help myself.

[fol. 162] Mr. Rainey: I will admit that he said he had the right to serve Wilson & Company.

The Witness: Whatever the testimony is. I was familiar with it at that time.

By Mr. Bennett:

Q. Mr. Sharp, I am not trying to ask you what that testimony shows now. I am asking you if you don't remember if you testified to that?

A. No, sir, I don't remember.

Mr. Rainey: We are perfectly willing that you put in at this hearing all of his testimony before the Commission. We don't want part of it in. Put it all in.

Q. Now, Mr. Sharp, as I understand it, you did go in there voluntarily to secure a lower rate from the Corporation Commission, didn't you?

A. Yes.

Q. So that you might get the benefit of the sale of additional gas?

A. Yes, sir.

Q. And you lowered your rate for that purpose, didn't you?

A. No. We gave all the consumers that would use a certain amount the pipeline rate, but we didn't lower the rate to the Oklahoma Gas & Electric Company or the wholesalers.

Q. No?

A. We gave them the wholesale rate.

Q. I am asking you if you didn't lower your rate to large consumers because you were about to lose all the industrial consumers you had?

A. Well, I imagine we tried to get more of them. If I remember correctly we were trying to increase the sales.

Q. You said you recognized that first letter that was introduced here?

A. Yes, sir.

Q. What three customers did you have in mind when you said to the Corporation Commission in that letter that you wanted to lower the rates so as to secure the three additional customers?

A. That was besides Cosden & Company.

[fol. 163] Q. How is that?

A. Besides Cosden & Company. It was originally meant for Cosden & Company, trying to get them to use the gas.

Q. What other two were they?

A. Sunflower Glass Company, and two or three consumers at Sapulpa.



Q. You had the Corporation Commission to lower the rate in order that you might take them on?

A. Not lower the rate; lower the amount.

Mr. Underwood: I object to that question. The rate was never lowered. The volume bracket was made lower.

A. The amount that they would use per month.

Mr. Brown: Mr. Underwood, do I understand that the rate was always fifteen cents?

Mr. Bennett: You know it was not.

By Mr. Bennett:

Q. Don't you know that you didn't have any fifteen cent rate for industries outside of cities before you made the application there to the Corporation Commission, September 15, 1924?

A. I think that is right.

Q. What is right?

A. I think we made a special rate provided they would use thirty million or more per month. We did that in order to get Cosden & Company's business.

Q. That is what I am saying. In other words, those patrons you had in mind you wanted to give a special low rate to of fifteen cents?

A. Any patron that we could sell direct to ourselves, we were willing to give them the wholesale rate:

Q. That is fifteen cents?

A. Fifteen cents. I think that was twenty cents originally and then—that was the previous rate to Cosden & Company, fifteen cents provided they would use thirty million or more per month.

Q. Later you went back and reduced that to a minimum of not to exceed fifteen million?

A. I think so. Whatever these rates were.

Q. To get additional customers?

[fol. 164] A. Whatever the rates were.

Q. Now, Mr. Sharp, you had reference in your direct examination, you say, by inference if not directly states, to industries lying about the borders or you say the city gates?

A. City gate stations.

Q. Of all the cities that you served direct?

A. Yes, sir.

Q. And your company served thirty to thirty-three direct?

A. Something around thirty. I don't remember.

Q. And among those cities that you served direct were the three in Oklahoma County—Edmond, Luther, and Arcadia—weren't there?

A. I think so.

Q. You think so?

A. I am not sure about those cities and towns.

Q. It is your information that they are in Oklahoma County?

A. If they were owned by the Oklahoma Natural Gas Company it would be.

Q. How is that?

A. If they were owned by the Oklahoma Natural Gas Company.

Q. Don't your records show that you served them? Doesn't your record for 1924 show that you served these particular cities and doesn't one of those exhibits that we showed you here show on its face that you served these three cities, Luther, Edmond, and Arcadia?

A. Those records will show if we were.

Q. So that if there had been an industry outside of Arcadia or outside of Luther or outside of Edmond they would have been entitled to this special rate?

A. Yes, sir.

Q. If they had used the fifteen or thirty millions of gas per month?

A. Yes, sir.

Q. Just as you said that the Cosden & Company were entitled to?

A. Yes, sir.

Q. You would have given it to them, wouldn't you?

[fol. 165] A. Yes, sir.

Q. So that if Wilson & Company, situated more than three thousand feet outside of the city limits, had moved its plant up to the same distance from the city limits of Arcadia or Luther or Edmond, they would have gotten the fifteen cent rate, wouldn't they?

A. No.

Q. Why?

A. Because we weren't distributing inside of the cities.

Q. I see.

A. And the Oklahoma Gas & Electric Company had the right to sell.

Q. I thought you said a moment ago that you distributed in those three cities, and that is the fact, isn't it?

A. Yes.

Mr. Underwood: I don't think he understood that question.

A. We weren't distributing in Oklahoma City, were we?

Mr. Bennett: I don't believe you understood my question. Read the question.

(The question was read by the reporter.)

Mr. Bennett: (Adding to question) From your company.

Mr. Underwood: We object to that as argumentative entirely, assuming a state of facts that couldn't possibly be true because the location of Wilson & Company's plant is well known.

Mr. Bennett: Do you mean it is impossible?

Mr. Underwood: I say it is impossible for Wilson and Company to have been located at one of these cities where the Oklahoma Natural Gas Company was serving gas.

Mr. Bennett: Do you mean to say that it is impossible for Wilson & Company to move their plant up there?

Mr. Underwood: We are not talking about the future. We are talking about between 1924 and 1926.

By Mr. Bennett:

Q. I am asking Mr. Sharp now if Wilson & Company had moved its plant up within three thousand feet or the same distance from the city limits, or you might say the city gates if you wish, of Arcadia or of Edmond or of Luther, if [fol. 166] they would not have gotten your fifteen cent rate just like Cosden and Company?

Mr. Underwood: We object to that as incompetent, irrelevant and immaterial, and does not comport with the facts and is purely argumentative.

Mr. Bennett: I say it does comport with the exact eternal truth.

Mr. Rainey: We have made our objection.

A. Mr. Bennett,—

By Mr. Bennett:

Q. Will you answer my question, and then you can make your explanation.

Mr. Underwood: Go ahead and answer it in your own way.

A. If they were located outside of Areadia?

By Mr. Bennett:

Q. Outside of Areadia.

A. Yes, because we serve those towns direct.

Q. That is what I am asking you. And outside of Luther?

A. Yes, sir.

Q. And outside of Edmond they would have got this fifteen cent rate, wouldn't they?

A. Yes.

Q. Now, Mr. Sharp, you knew that this rate to give your customers lying outside of the cities served by you, authorized by the Corporation Commission, applied to your entire system, both the main system and in the Enid system, didn't you?

A. Not at any towns that we didn't furnish ourselves that we didn't own the distribution plant.

Q. It applied to the entire system as well as the Enid branch or system, did it not?

A. As well as the Enid?

Q. Yes, sir.

A. We didn't own the Enid distribution system.

Q. Let's see now. Just a minute. I will ask you, Mr. Sharp, to look over journal entry number 1203 in cause 6030, and ask you how the title of that journal entry reads. Just go ahead and read it into the records, please, sir.

Mr. Rainey: We object to that as incompetent, irrelevant, and immaterial.

[fol. 167] A. It says, "In the matter of rates charged for natural gas for industrial purposes only by the Oklahoma Natural Gas Company in its general system and Enid system, excluding Claremore, Inola, and Ramona."

Q. That was the journal entry predicated upon your voluntary application to the Corporation Commission, was it, to allow you to make a lower rate to industries lying upon the two systems; that is, your general system and your Enid system?

Mr. Rainey: We object to that as incompetent, irrelevant and immaterial.

A. Well, this isn't the first one.



Q. Will you answer my question?

A. I think this is the order made at that time.

Q. You made your application and they predicated upon your application this order. That is right, isn't it?

A. I would imagine so.

Q. I will ask you to read the title of this order, which is order number 1239 in cause 6030. Read the title into the record there, if you will, please, sir.

A. "In the matter of rates charged for natural gas for industrial purposes only by the Oklahoma Natural Gas Company in its general system and Enid system, excluding Claremore, Inola and Ramona."

Q. Isn't that the order, Mr. Sharp, predicated upon your voluntary application to the Corporation Commission to allow you to make that price where the use of gas per month should equal fifteen millions instead of thirty millions, as under the former order?

A. I think that is the order.

Q. How is that?

A. I think that is the order, yes, but again I can't remember those orders.

Q. Now, Mr. Sharp, in one of these journal entries before the Corporation Commission it is indicated that you had made representations to the Corporation Commission in order to get this reduced rate, that you had discovered and had open to your use an immense amount of gas in the Chickasha field and that you represented that you were [fol. 168] taking from that field less than one-tenth of one per cent of the gas that was available to you? Do you remember that?

A. Well, I don't remember the exact figures. It was small. I remember that.

Q. I will ask you if you don't recall that you made representations to the Corporation Commission that the Texas—What is that Texas gas company?

A. Lone Star Gas Company.

Q. That the Lone Star Gas Company was taking from that field quite a proportion of gas and selling it at a larger domestic rate and perhaps at a lower industrial rate in the towns of Texas?

A. I don't remember about the rates. That was a fact.

Q. Yes, that was a fact.

A. I don't know as it was a fact I told them, but that was the facts in the case.

Q. Those were the facts?

A. Those were the facts, that the Lone Star Gas Company was taking gas south from the Chickasha field into Texas.

Q. You knew before you represented it to them that your customers were going away from you in Oklahoma, that you were losing your industrial gas business. Didn't you represent that to them?

Q. I don't remember the detail of that.

Q. You don't deny it?

A. It was either that or we wanted to get more. I don't know which it was.

Q. You wouldn't deny it?

A. We wanted to sell all the gas we could.

Q. I say, you wouldn't deny it?

A. I don't know whether I would or not.

Mr. Underwood: He has answered; he said he doesn't remember. That is all a man can do.

Mr. Bennett: Let him answer it.

By Mr. Bennett:

Q. Will you answer that. You will either deny it or will not deny it?

A. I don't remember.

Q. I say, will you deny it?

[fol. 169] Mr. Underwood: He doesn't have to.

Q. That you made that representation to them?

Mr. Underwood: We object to that as incompetent, irrelevant and immaterial. He has answered it two or three times.

Mr. Bennett: If he will answer it once it is enough for me.

A. I don't remember. I don't want to deny or affirm because I don't remember.

By Mr. Bennett:

Q. You won't deny it, then, as I understand?

A. No.

Q. All right. Now, Mr. Sharp, did you know at the time when you were selling industrial gas in Oklahoma that Wilson & Company was lying more than three thousand feet beyond the limits of the city?

A. No, I did not.

Q. You knew they were lying a long way out?

A. I knew it was an Oklahoma Gas and Electric Company consumer.

Q. I am now talking about Wilson & Company now. Didn't you know where they were located?

A. No. There are a lot of places I was never to. I was never in your plant myself, to my knowledge.

Q. You were looking for new customers or additional industrial customers. Didn't you know, Mr. Sharp, that they were paying to the Oklahoma Gas & Electric Company twenty-five per cent more for industrial gas to the Oklahoma Gas & Electric Company than you would have sold it for, and that you were within a few feet of their property line?

Mr. Underwood: I object to that as incompetent, irrelevant and immaterial.

By Mr. Bennett:

Q. That is, that your gas mains were within a few feet of their property line and ran probably a half mile alongside of their plant?

Mr. Underwood: We object to that as incompetent, irrelevant, immaterial, and is not illuminative to any issue in this case.

Q. Did you know that?

The Witness: Read the question.

[fol. 170] (The complete question was read by the reporter.)

A. I remember that the Oklahoma Gas & Electric Company's rate was twenty cents. Whether our price to them was fifteen cents—we couldn't afford to cut our price to them.

By Mr. Bennett:

Q. Why couldn't you afford to? You didn't take them over.

A. Mr. Bennett,—

Q. You didn't take them over—Wilson & Company—because Wilson and Company was being served by your best patron? That is a fact, isn't it?

A. Well, that could be. We hadn't professed to serve—

Q. You say it could be what?

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A. We certainly wouldn't want to take any customers away from the Oklahoma Gas & Electric Company that we agreed not to. They wanted to sell the packing town industries.

Q. How do you know that they wanted to sell them?

A. I heard them talking about it.

Q. When?

A. I couldn't give you the exact date.

Q. Give us about the date.

A. Well, they were at the time we were considering the city gate rates.

Q. And afterwards? They were saying to you then that they wanted to serve Wilson & Company, were they? How did that happen to arise?

A. They came within the five mile limit.

Q. I didn't say anything about the five mile limit. I am just asking you how that discussion arose between you and Oklahoma Gas & Electric Company.

Mr. Underwood: We submit the witness has answered the question.

Mr. Bennett: I want the answer of the witness and not the lawyer.

Mr. Underwood: I want the answer of the witness too. When you get an answer you should be satisfied with it and not your own.

A: I don't remember.

By Mr. Bennett:

Q. How is that?

[fol. 171] A. I don't remember when that was.

Q. Do you know what it was that I asked you?

A. Yes.

Q. What?

A. You asked me when it was.

Q. When?

A. About when and I don't remember when it was.

Q. Didn't you tell it was just about the time that they were talking about the gate rate?

A. I know we talked about it at the time the gate rate was made.

Q. With whom did you talk about it?

A. With the Oklahoma Gas & Electric Company. Mr. Hughie, in Chicago, and I believe Mr. Owens.

Q. Who was the man that you talked to?

A. Mr. Hughie.

Q. Who is Mr. Hughie?

A. He is a man in Chicago that we had the most of our sessions with.

Q. What official position, if any, did he occupy with the Oklahoma Gas & Electric Company?

A. I don't know.

Q. What was your business with him? What were you talking about?

A. He had, I think, more to say with the company, the holding company of the Oklahoma Gas & Electric Company, in Chicago. Our sessions were all in Chicago practically; few, if any, in Oklahoma City.

Q. Do you mean that he represented, then, the Oklahoma Gas & Electric Company?

A. He had to pass on it?

Q. How is that?

A. He had more to do than anybody else I know of in passing on it.

Q. Who on your side had to do with it?

A. I did.

Q. You did?

A. Yes, sir.

[fol. 172] Q. You represented the Oklahoma Natural Gas Company and Mr. Hughie represented the Oklahoma Gas & Electric Company, and you had conferences in Chicago at about the time of the gate rate order was promulgated?

A. Before and afterwards too.

Q. Before and afterwards, to the effect that he wanted to serve Wilson & Company? Is that it?

A. They wanted all the industrial consumers around the cities and towns that they had been serving.

Q. How many were they at Oklahoma City?

A. How many consumers?

Q. Yes, sir, outside the city limits?

A. I don't know.

Q. You knew that there wasn't another one?

A. No, sir, I didn't know any such a thing.

Q. You know it now?

A. No, sir, I don't know it now.

Q. Is there any other industry outside the city of Oklahoma City that was then taking gas from the Oklahoma Gas & Electric Company for industrial purpose?

A. Mr. Bennett, I have been in Oklahoma City about twice in three or four years.

Q. Why were you talking about Wilson & Company?

A. At that time?

Q. Yes, sir.

A. Possibly not Wilson & Company exclusively, but whatever there was.

Q. You said awhile ago that you were talking to him and he was talking to you about wanting to serve Wilson & Company.

A. There was some other packing plant over there too.

Q. What other packing plant?

A. I don't know.

Q. Don't you know that the other packing plant never have taken gas from you or from the Oklahoma Gas & Electric Company either?

A. No, sir, I don't know that.

Q. Don't you know that Armour & Company use the dust of coal or pulverized coal?

[fol. 173] A. No, sir.

Q. How many time did you talk with Mr. Hughie about he wanting to serve Wilson & Company?

A. I don't know. Maybe not more than once. It could have been brought up two or three times.

Q. You said a moment ago that you talked to him before the gate rate came up and afterwards. That is right, isn't it?

A. Yes.

Q. And then I think later you said perhaps you talked to him more than once or several times. Which is right?

A. I would imagine two or three times.

Q. Two or three times?

A. I don't remember. That was back in 1921 and I don't remember.

Q. How did the question of your serving Wilson & Company come up?

A. Well, we were discussing all of the industrial consumers and naturally we knew that we could sell them direct if they would allow us to have those consumers and sell them direct. We would give them the same price that we were selling the other people.

Q. You would have gotten the same price for your gas?

A. Yes, sir.

Q. They would have gotten exactly the same price?

A. Yes, sir.

Q. In others words, it would not have been a dime out of your pocket?

A. But we couldn't afford to sell them if they objected to it.

Q. But it wouldn't have been a dime out of your pocket?

A. No, sir.

Q. You would have gotten the same price that you charged them for it?

A. With the exception of what it would have cost us in service.

Q. You understood that you couldn't do that because it was their customer?

A. Yes, sir.

Q. Why couldn't you serve them yourself?

[fol. 174] A. I don't remember now why.

Q. You knew it was located three thousand and more feet beyond the city limits?

A. I beg your pardon. I didn't know it was three thousand feet or ten thousand feet.

Q. You knew it was a considerable distance?

A. I knew that you were around packing town. That is all I did know.

Q. You knew a little about packing town?

A. I knew it was located there.

Q. You had been through it?

A. I might have driven around it.

Q. I will ask you if this question wasn't asked you, or if you didn't make this answer: "I have been through packing town but I don't remember anything whatever, about it"?

A. I didn't even remember that I had been through it.

Q. You do now, don't you?

A. No, sir, I don't.

Q. Mr. Sharp, when you talked to Mr. Hughie about wanting to serve Wilson & Company, did you tell him to go ahead and serve Wilson & Company?

A. Did I tell him?

Q. Yes.

A. Whatever the understanding was at that time.

Q. I just asked you if you told him to go ahead and serve them?

A. I don't remember what I told him at that time, and you wouldn't either, Mr. Bennett.

Q. How do you know that?



A. Well, you are a super-man and I am not—twelve years ago.

Q. How do you know that?

Mr. Rainey: We are just wasting time.

Mr. Bennett: The witness is wasting time; I am not.

The Witness: I beg your pardon.

By Mr. Bennett:

Q. Mr. Sharp, at any rate, due to what you told him Mr. Hughie went ahead and served Wilson & Company direct?

[fol. 175] A. Yes. I might have asked him for Wilson & Company and the other packing companies and he might have said that we were not entitled to them, but we were very anxious to get this city gate rate into effect.

Q. You wanted to sell all the gas that you could at fifteen cents?

A. Yes, sir, and still be friendly with those that were co-operating with us in giving service.

Q. I will ask you why you didn't tell the Oklahoma Gas & Electric Company that these people were without the city by a great distance, that that being true, "that we can give them a rate that will save them twenty-five per cent and will save those people probably \$3,000 a month?"

A. I don't know.

Q. You didn't do it because you knew you had the power or you thought you ought to favor your chief customer competitor?

A. No, sir.

Q. Tell me what was the reason for not giving them service?

A. We either didn't, as I remember it, because we were not obligated to serve you or felt that we couldn't serve you over their objection. Now, I don't know—

Q. Now, were they objecting to it?

A. Why, naturally they would want to keep their customers.

Q. I didn't know that they were; you haven't said it, that they were objecting to you taking Wilson & Company over.

A. They wanted all the consumers that they could get.

Q. Were they saying anything about it? You said that they objected to it.

A. I said it might be that, Mr. Bennett.

Q. Isn't it your recollection that they did object to it?

A. I don't know. I don't remember whether they did or not.

Mr. Rainey: As a matter of fact, Judge—

Mr. Bennett: I don't want to be lectured and I don't want the witness lectured.

Mr. Rainey: I don't want to lecture you I want to correct [fol. 176] you on some of the facts. You seem to be laboring under a misapprehension.

Mr. Bennett: I will get the facts.

By Mr. Bennett:

Q. You didn't want to take them over and serve them direct because the Oklahoma Gas & Electric Company was your biggest customer in the state?

A. We were either not entitled to the account, which I am not familiar with as to the exact location to know whether we would be, or whether it was considered at that time that the Oklahoma Gas & Electric Company could retain the packing town business. I don't know.

Q. Was there then a provision or condition in your talk with Mr. Hughie that they should retain the packing house business?

A. I don't remember.

Q. You don't remember?

A. No, sir.

Q. There might have been?

A. There might have been; I don't know.

Q. How?

A. It might have been. I am not going to testify—twelve years ago—not being familiar with all the conversations.

Q. You knew this lawsuit was pending, didn't you?

A. I haven't heard anything about this lawsuit. I thought it was settled. I haven't heard anything about it until I was asked to go down as a witness.

Q. What is your interest in this lawsuit?

A. Not a thing in the world. I don't own a nickel's worth of Oklahoma Natural stock. I don't even come down to their office for fear that they would think I was trying to butt in on the management. I was glad to get away from it.

Q. You were trying to serve your best patron by letting them serve Wilson & Company and get the benefit of the large price?



A. Whatever the facts were. We tried to do whatever was best for all concerned.

Q. Did you take into consideration there that your duty as a public service corporation obligated you to serve without discrimination?

[fol. 177] Mr. Rainey: We object to that as incompetent, irrelevant and immaterial, and I want to state this in the record because I think counsel knows it, that Wilson & Company was not consuming gas at the time of the gate rate order, in 1921, and were not buying gas for fuel from the Oklahoma Gas & Electric Company, and they did not take until 1923 or 1924.

Mr. Bennett: I don't want his statement in the record there because he is not sworn. I want him sworn if he is going to testify.

Mr. Rainey: I am stating the ground of my objection.

Mr. Bennett: No, you are predicated it upon a statement of fact that is not here.

Mr. Rainey: It is all through this record.

Mr. Bennett: It isn't true. We have been taking gas since 1917.

Mr. Rainey: Not for fuel.

Mr. Bennett: We were taking it for fuel, since 1917. That is my statement against yours.

Mr. Rainey: From the Oklahoma Gas & Electric Company?

Mr. Bennett: From the Oklahoma Gas & Electric Company, and W. R. Kirby so testified in the record, to the Corporation Commission, and the Corporation Commission found that they had for many years been taking gas off and on.

Mr. Rainey: Off and on.

Mr. Bennett: Some times when the oil price was too high.

Mr. Rainey: I am talking about since 1921.

Mr. Bennett: There is a finding in this record—

The Witness: You mean that you had been using it temporarily?

By Mr. Bennett:

Q. That we had been using it off and on for many years.

A. That you had been using it temporarily, when your other stuff was out of commission.

Mr. Rainey: I can give you the facts.

Mr. Bennett: I know them.



[fol. 178] By Mr. Bennett:

Q. Now, Mr. Sharp, did you know the price which the Oklahoma Gas & Electric Company was charging Wilson & Company for this industrial gas?

A. Not any more definite than I had a general idea. I knew at that time what their prices were.

Q. I am talking about at that time. Did you know at that time?

A. I knew at that time, if I remember correctly, their price was twenty cents. I am not sure.

Q. You knew that your line lay within a few feet of Wilson and Company's plant?

A. No, sir, I didn't even know the location of the line, Mr. Bennett, because I didn't look after the construction of property or the operating of the physical property.

Q. Yes.

A. They have got men here that did. Mr. Porter at that time, in this case, testified, if I remember correctly, because he was familiar with it.

Q. Yes.

A. I never went out to sell any gas. I may have gone to one or two customers on our own system, such as Cosden & Company, but I tried to stay to the other end of the work. I didn't get into the really technical end of it.

Q. Do you mean to say that there was a patron outside of Oklahoma City who was taking as much as fifty to seventy-five million cubic feet of gas per month that you didn't know about?

A. I didn't read the meters.

Q. I don't care whether you read the meters or not. Don't you know that is true, Mr. Sharp?

A. As I remember it, I understand that you were taking service only temporarily, a little bit from time to time. I don't know whether that came in as a matter of convenience.

Q. You knew that the Corporation Commission found as a matter of fact that we had been taking gas as fuel for years and years, didn't you?

A. No, sir, I didn't.

Q. Didn't you know that?

A. I possibly knew it at the time. I read that record at that time but I haven't read it since.

[fol. 179] Q. Now, Mr. Sharp, you furnished the very gas to the Oklahoma Gas & Electric Company that they furnished to Wilson & Company?

A. I think we furnished the gas to them that they furnished to every one of their customers.

Q. There was no competition there?

A. I don't think so.

Q. Your two companies, you the transporting company?

A. Yes, sir.

Q. And the Oklahoma Gas & Electric Company as the distributing company, were the only available sources of gas for fuel in Oklahoma City? You knew that?

A. I knew that we furnished them gas and I think we furnished them all the gas that they used.

Q. You knew that there was no other gas company furnishing gas there, didn't you?

A. That is right.

Q. You knew that if you didn't take them over and serve them at fifteen cents that they would be compelled, if they used gas as fuel, to pay the Oklahoma Gas & Electric Company twenty cents?

A. Whatever the rate was.

Q. You knew that?

A. Their rate was fixed by the Corporation Commission, was it not?

Q. You knew what the rate was?

Mr. Rainey: He has answered that two or three times. He has said that two or three times.

Mr. Bennett: He doesn't say that. You say it but he doesn't say it.

Mr. Rainey: He said it a few minutes ago.

A. Yes, as I remember it, the rate was twenty cents.

By Mr. Bennett:

Q. Why didn't you answer my question then?

Mr. Rainey: He did.

Mr. Bennett: No, he didn't.

By Mr. Bennett:

Q. You know that they would have to pay twenty cents [fol. 180] where you could furnish the same gas for fifteen cents?

A. Yes.

Q. How?

A. Certainly.

Q. Yes, sir. You and Mr. Hughie talked about it time and again both before and after the gate rate, and that he wanted to serve them?

A. We never talked about it after the city gate rate had been put into effect.

Q. I thought you said that you did talk about it both before and after.

A. They appealed from the gate rate order and it was six months or a year maybe—I don't know when it was. I would say six months, according to my memory, before the Oklahoma Gas & Electric Company decided to accept the city gate rate. They appealed from the order of the Corporation Commission to the Federal Court.

Q. You knew the provision of that order from which they were appealing?

A. I did then but not now.

Q. You knew the rates, didn't you?

A. The rate was thirty-eight or forty cents.

Q. The industrial rate?

A. Whatever the rates were. I think our rate at the same time was twenty cents for the second stop.

Q. Mr. Sharp, I will ask you if your rate for industrial gas hasn't always been eighteen cents, even in the cities where you served? Have you forgotten that too?

A. No. I think you are right on that.

Q. But you had forgotten that?

A. We figured we could furnish—that we could afford to sell the gas cheaper—

Q. You have always sold in the cities served by your direct industrial gas, where they used it in quantities, at eighteen cents?

A. Whatever the records show.

Q. I didn't ask you about the records. Didn't you say awhile ago that was your recollection, that it was eighteen cents? Is that right or wrong?

[fol. 181] A. I am not sure, But I think it is. But I am not sure.

Q. You think it is right?

A. I think it is right, but I am not sure, Mr. Bennett.

Q. You knew that the Oklahoma Gas & Electric Company rate, without respect to whether inside or outside the city, was considerably in excess of your rate for industrial gas?

A. Whatever it was.

Q. You knew that, didn't you, Mr. Sharp?

A. If their rate was twenty cents it was two cents above ours, because our rate was eighteen cents.

Q. I thought you said that you knew that.

A. I don't remember what their schedule of rates was. Those are all things that can be verified by the record.

Q. Mr. Sharp, when the Oklahoma Natural Gas Company took over the Oklahoma Gas & Electric Company, what if any arrangements were made by the negotiating companies to meet the liability in this case, if any?

A. Well now, the Oklahoma Natural Gas Corporation assumed all liabilities and took all assets.

Q. They assumed this liability?

A. They assumed all; they didn't specify this one.

Q. They assumed this along with the others, if there was any?

A. It would come within all, wouldn't it?

Mr. Rainey: Judge Bennett, I don't believe Mr. Sharp knows, but I don't mind telling you.

Mr. Bennett: I would rather the witness told me.

Mr. Rainey: I thought you might want to know.

Mr. Bennett: I want to find out what the witness knew about it.

Mr. Rainey: I thought you wanted to know the truth.

Mr. Bennett: Do you know that the receptacle of truth isn't located in any one particular person?

Mr. Rainey: I thought you wanted to get it in the record. There was a specific agreement as to this specific liability.

Mr. Bennett: I want to know if this witness knows anything about it.

[fol. 182] A. I do not. I never heard it mentioned.

By Mr. Bennett:

Q. Then you have forgotten about that detail?

A. There is an agreement on that when they took it over.

Q. Where is that agreement? Is it in writing?

A. I don't know whether it is in writing or not. Judge Rainey can tell you more about that than I can.

Q. Will you produce that?

A. I haven't that agreement in my possession.

Q. Isn't it a part of the records of the purchasing company, the Oklahoma Natural Gas Corporation?

A. I don't know. The attorneys for that corporation can no doubt tell you about that.



Q. You are the man I am examining.

A. You are asking me a lot of things that I cannot answer, that I would like to answer for you.

Q. Mr. Sharp, there was no economic reason why you should not have served Wilson & Company?

A. No.

Q. You had plenty of gas?

A. Well, sometimes we did and sometimes we didn't.

Q. Yes.

Mr. Rainey: We object to that as argumentative and repetition.

By Mr. Bennett:

Q. If they had paid you the same rate that you made for these other cities that would have met with your approval?

A. We couldn't afford to sell anyone that they were entitled to sell and that they would object to our selling, and we hadn't started in to take on such customers and it wasn't our idea to do so.

Q. In other words, you didn't take Wilson & Company on because the Oklahoma Gas & Electric Company objected to it? That is it, isn't it?

A. They were possibly entitled—I don't remember their location.

Q. Won't you answer my question?

A. I don't remember.

Q. You don't remember anything about it?

[fol. 183] A. I have sat in a good many cases, Mr. Bennett, but I was never in a case where people wanted me to go back ten or twelve years and remember about records.

Q. Mr. Sharp, you have known always that this case was pending either in federal courts or state courts or before the Corporation Commission for the last eight or ten years, or for the last six or eight years?

A. I beg your pardon. I thought this case was settled years ago, until the time it was up before Judge Vaught, and I said I thought that case was settled years ago.

Q. Mr. Sharp, did I understand you to say awhile ago to Judge Rainey that you did not take over any customers outside of Oklahoma City after the gate rate was promulgated?

A. I couldn't state to you definitely about that, but the records of the company will show whether they did or not.

Q. Did you say awhile ago that you did not take over any, to Judge Rainey?

A. I don't think so.

Q. You don't think so. Then you don't know now whether you did or not?

A. Do you mean outside of the city limits?

Q. Outside of the city limits of Oklahoma City.

A. We did take over some domestic consumers.

Q. How many?

A. I don't know.

Q. Where did they live?

A. I thought that was all coming in with the records Mr. Brown had asked for.

Q. You knew that you did take over domestic consumers?

A. Yes, there was some. I don't know how many or where they were located.

Q. You knew you took over some out there near Bethany, didn't you?

A. No, sir, I didn't know that. I don't remember of being in Bethany in my life.

Q. How is that?

A. I don't remember of ever being in Bethany in my life. I have driven from Oklahoma City to Chickasha and from here to Oklahoma City, but I never made any trips to the O. G. & E.'s small towns.

[fel. 184] Q. Do you remember this: "What was that understanding?"

A. I don't remember. Sometime after that there was a condition came up at Bethany in which we had a hearing. I don't know whether it was a formal hearing. Possibly Commissioner Carter would remember it."

Q. Do you remember anything like that?

A. If they referred to Commissioner Carter it would be the dog hospital. That is what it would be.

By Mr. Bennett:

Q. How is that?

A. I wouldn't be sure about that, but it would be my opinion that was referring to the dog hospital, or whatever his name was over there.

Q. The dog hospital?

A. Yes, sir. I believe you called it a country club or roadhouse or something.

Q. You are talking about Billy Gregg?

A. Yes, sir.

Q. You took him over?

A. Yes, sir.

Q. I will ask you if your line wasn't almost a half a mile from your main line?

A. I don't know, Judge. I never was at Gregg's and I don't know where Gregg's place is even located.

Q. You know that he runs a—

A. Mr. Carter asked me to take over Gregg and furnish gas out there, and being asked by the Corporation Commission to do it, we agreed to it.

Q. And you did take him over?

A. Yes, sir. That was a hospital; he referred to it as a hospital.

Q. Mr. Sharp, you knew that they didn't have any hospital there?

A. I beg your pardon, I did not, Judge Bennett. If I did I would tell you. It is nothing to me. He said they had a hospital, and he said a dog hospital.

Q. Who do you mean?

A. Mr. Frank Carter.

Q. You asked him what kind of hospital?

[fol. 185] A. Yes, sir.

Q. He said what?

A. He said dog hospital, a hospital for dogs.

Q. So that you were serving the biggest night club around Oklahoma City—

A. I don't know that.

Q. Upon the thin theory that you were serving a dog hospital?

A. I don't know that.

Mr. Rainey: I object to that as argumentative.

Mr. Bennett: I think that is all.

### Redirect Examination.

By Mr. Rainey:

Q. Mr. Sharp, on these exhibits that have been identified as Exhibits 1, 2, 3, 4 and 5, relating to industrial rates outside of corporate limits of the towns and cities served by the Oklahoma Natural Gas Company, did they have any application to rates inside the city gates or measuring stations where you sold other distributing companies?

A. Not to my knowledge.

Q. And you never gave that rate inside of the gates or measuring stations to any consumer?

A. Not that I remember of.

Q. Where you didn't own the distributing systems yourself?

A. No, sir.

Mr. Rainey: Now, Mr. Brown and Judge Bennett, there is a question that isn't pertinent to this proposition but it is in the district court case and we can cover it by stipulation.

Mr. Brown: All right.

Mr. Bennett: All right.

By Mr. Rainey:

Q. Mr. Sharp, after the order was made by the Corporation Commission in this case requiring the Oklahoma Natural Gas Company to serve Wilson & Company direct, did Wilson and Company ever build a line out to your main lines or service lines anywhere?

A. Not that I have any knowledge of, no, sir.

Q. Did they demand service from you after the entry of [fol. 186] that order, tell you that they were ready for service, at any time that you remember of?

A. Well, I don't remember that.

Q. Mr. Sharp, has the Oklahoma Natural Gas Company or its successor, the Oklahoma Natural Gas Corporation, up to the time of the—that would be just the first one, the Oklahoma Natural Gas Company—up to the time of the entry of the order in this case, in April, 1926, ever serve any consumer outside and beyond the measuring stations or city gates, that is at the point—beyond the point where the gas was measured—to the local distributing company except where you were required to serve them by reason of the statute where you cross their property and the consumers who were being served by the Oklahoma Gas & Electric Company at the time of the gate rate order, and your subsequent agreement, and who were outside of or beyond the point where you delivered the gas to the Oklahoma Gas & Electric Company to the dog hospital? To your knowledge have you ever served or undertaken to serve anyone else in Oklahoma County?

Mr. Brown: We object to that on the ground it calls for a conclusion of the witness.



Mr. Bennett: Go ahead.

Mr. Rainey: I am just asking for the fact.

A. Any industrial consumer?

By Mr. Rainey:

Q. Yes, sir.

A. I do not.

Q. Do you know of any domestic consumer besides those that had been served by the Oklahoma Gas & Electric Company prior to the gate rate order and who were beyond the city gates and on your lines beyond the city gates?

A. I don't remember of any.

Q. Don't remember of any?

A. No, sir.

(Witness excused.)

#### Testimony of E. D. Hicks

E. D. Hicks testified that he was Secretary of the Corporation Commission of the State of Oklahoma and had control, possession and custody of the records of said Commission, and there had not been filed with said Commission, in [fol. 187] cause No. 7052 any supersedeas bond by the Oklahoma Natural Gas Company or the Oklahoma Natural Gas Corporation. An objection of Wilson & Co. as to the materiality, competency and relevancy of this testimony was overruled with exceptions.

#### Testimony of Gus Pool

Gus Pool testified that he was Clerk of the Supreme Court of the State of Oklahoma, and had control, possession and custody of the records of the Supreme Court, and that according to said records there had never been filed in the Supreme Court of the State of Oklahoma, in cause No. 17,859, entitled Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, vs. Wilson & Co., the State of Oklahoma, and the Corporation Commission any bond by the Oklahoma Natural Gas Company or the Oklahoma Natural Gas Corporation. An objection of Wilson & Co. as to the materiality, competency and relevancy of this testimony was overruled with exceptions.

The complainants introduced the following exhibits:

Exhibit No. 7 is a certified copy of the appointment of an agent for Wilson & Company of Oklahoma upon whom service of summons might be had, which exhibit, omitting the Secretary of State's certificate, is as follows:

### PLAINTIFFS' EXHIBIT 7

#### "Appointment of Agent

"Know All Men By These Presents:

"That the Wilson & Co., Inc. of Oklahoma *Company* a corporation organized under the laws of the state of and which has its principal place of business in the State of Oklahoma, in Oklahoma City, County of Oklahoma, does hereby nominate and appoint for itself and successors, the following-named persons, to-wit:

"Wilfred W. Martin as its agent and attorney in fact within the State of Oklahoma, who is a citizen of the State of Oklahoma and who resides in the City of Oklahoma City, Oklahoma County, the Capitol of Oklahoma, at No. 1914 N. W. 22nd Street, as its true and lawful agent and attorney upon whom services of process, mesne and final may be had in any action in the State of Oklahoma to which the said Company may be a party, hereby revoking any and all appointments of service agents heretofore made.

[fol. 188] "And said Company does hereby and now acknowledge it is bound by the services of all such process, mesne and final on said agent and attorney in fact and acknowledges the same to be as binding and obligatory upon the Company as if served on it in person under the laws of Oklahoma or any other State or Territory, and consents that such service shall be taken and held to be a due and legal service on this Company under the laws and statutes of the State of Oklahoma.

"Said Company consents that all actions against it may be brought in the county in which the cause of action arose, as now provided by law.

"Said Company hereby certifies that W. W. Martin whose address is Oklahoma City, Oklahoma, is its resident agent in charge of its principal place of business in Oklahoma City (Stock Yards Station) in the State of Oklahoma.

"In Witness Whereof, the said company has caused its name to be subscribed hereto by its president and caused this instrument to be attested by its secretary under its corporate seal, this 7 day of December, A. D. 1932.

"Wilson & Co., Inc., of Oklahoma, by James D. Cooney, Its President.

"Attest: C. W. Becken, Assistant Secretary." (Seal.)

Endorsements: Files 12-12-32. Recorded in Vol. 244, Page 447. R. A. Sneed, Secretary of State. By Una Lee Roberts, Assistant.

1.00' mailed to Bennett & Bennett, 1018 Colcord Bldg., Oklahoma City, Okla.

#### PLAINTIFFS' EXHIBIT 8

Exhibit No. 8 is a copy of the bill of complaint in cause No. 1144 Equity, and filed in the United States District Court for the Western District of Oklahoma on July 24, 1930, and styled Oklahoma Gas & Electric Company, a corporation, Oklahoma Natural Gas Company, a corporation, W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp; the Directors of the Oklahoma Natural Gas Company, a dissolved corporation, and Oklahoma Natural Gas Corporation, complainants, vs. Wilson & Company, Inc. of Oklahoma, The Corporation Commission of the State of Oklahoma, Paul Walker, Chairman, C. C. Childers and E. R. Hughes, members of said Commission, and J. Berry King, Attorney General of the State of Oklahoma, defendants, in [fol. 189] which bill of complaint complainants assailed order No. 3388 of the Corporation Commission as being null and void on substantially the same grounds as are alleged in the bill of complaint in this cause and in which the complainants sought to enjoin the defendants from enforcing or attempting to enforce said order.

#### PLAINTIFFS' EXHIBIT 9

Exhibit No. 9 is an order of dismissal without prejudice of said Cause No. 1144 Equity, filed on the 19th day of May, 1932.

### APPROVAL OF JUDGE VAUGHT, DISTRICT JUDGE

On this 28th day of February, 1938, the foregoing statement of evidence having been presented to me, the same is true, complete and properly prepared, and is hereby in all things allowed and approved; and also the setting forth of the portion of the testimony of the witness, R. C. Sharp, in the exact words of the witness in the form of questions and answers as heretofore directed by me, is also approved, and the same is hereby ordered filed as the statement of the evidence to be included in the record of appeal in the above-styled and numbered cause as provided in Equity Rule 75.

Enter.

Edgar S. Vaught, District Judge.

Approved; R. M. Rainey, I. J. Underwood, Attorneys for Defendants-Appellants. W. R. Brown, G. H. Holloway, Attorneys for Plaintiffs-Appellees.

### IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed December 6, 1937

The defendants, Oklahoma Packing Company, formerly Wilson & Co., Inc. of Oklahoma, an Oklahoma corporation, and Wilson & Co., Inc. of Oklahoma, a Delaware corporation, conceiving themselves aggrieved by the final order and decree made and entered in the above-entitled cause September 10, 1937, by Judge Edgar S. Vaught of the United States District Court for the Western District of Oklahoma, granting to the complainants a permanent and perpetual injunction enjoining said defendants and each of them, their officers, agents and attorneys, and all persons acting or [fol. 190] claiming through or under them or any of them, from enforcing or taking any steps to enforce order No. 3388 of the Corporation Commission of the State of Oklahoma, entered on April 13, 1926, and further perpetually and permanently enjoining them from further proceeding in or to prosecute other than to dismiss the same with prejudice, a certain action pending in the District Court of Oklahoma County, Oklahoma, numbered 71898, wherein Wilson & Co., Inc. of Oklahoma a corporation is plaintiff and Oklahoma Gas & Electric Company a corporation, and The Fidelity & Casualty Company of New York, a corpora-



tion; are defendants, and further perpetually and permanently enjoining them from commencing or prosecuting any other action or proceeding in law or equity upon or on account of any of the matters involved in said action in the said District Court of Oklahoma County, or at any time in any manner asserting any rights claimed in said action in said District Court of Oklahoma County, Oklahoma, do hereby appeal therefrom to the United States Circuit Court of Appeals for the Tenth Circuit for the reasons specified in the Assignment of Errors which are filed herewith.

The defendants pray that their appeal may be allowed and that a citation be issued to the above-named complainants, Oklahoma Gas & Electric Company, a corporation, Oklahoma Natural Gas Company, a corporation, W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp, the Directors of the Oklahoma Natural Gas Company, a dissolved corporation, and Oklahoma Natural Gas Corporation, to do and receive what may appertain to justice to be done in the premises, and that a transcript of record, proceedings and papers upon which said order and decree were made, be duly authenticated and sent to the Circuit Court of Appeals for the Tenth Circuit; and said defendants further pray that an order be made fixing the amount of the security to be given by them as provided by law.

Dated this 6th day of December, A. D. 1937.

G. H. Holloway, Oklahoma City, Oklahoma; W. R. Brown, 4100 So. Ashland Avenue, Chicago, Illinois,  
Solicitors for Defendants and Appellants.

[fol. 191] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed December 6, 1937

Comes now the above-named defendants, Oklahoma Packing Company, formerly Wilson & Co., Inc. of Oklahoma, an Oklahoma corporation, and Wilson & Co., Inc. of Oklahoma, a Delaware corporation, and file the following Assignment of Errors upon which they and each of them separately and severally will rely, in the prosecution of an appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the order and decree by Edgar S. Vaught, Judge of the United States District Court for the Western

District of Oklahoma, in this cause, on September 10, 1937, permanently and perpetually enjoining defendants from further prosecuting order No. 3388 of The Corporation Commission of the State of Oklahoma, entered on April 13, 1926, and from further prosecuting a certain action pending in the District Court of Oklahoma County, Oklahoma, numbered 71898, and from commencing or prosecuting any other action as to any matters involved in said suit.

1. The court erred in not dismissing the bill of complaint for want of equity.

2. The court erred in overruling the objection of Wilson & Co., Inc. of Oklahoma, a Delaware corporation, to being sued in the Western District of Oklahoma because this defendant is not an inhabitant of the Western District of Oklahoma.

3. The court erred in enjoining the further proceeding in the in personam action for damages by Wilson & Co., Inc. of Oklahoma against the complainant, Oklahoma Gas and Electric Company and its surety, pending as case No. 71898 in the District Court of Oklahoma County, Oklahoma, for the reason that such injunction is prohibited by Section 265 of the Judicial Code.

4. The court erred in enjoining the defendants, their officers, agents and attorneys, and all persons acting or claiming through or under them, from enforcing or taking any steps to enforce order No. 3388 of The Corporation Commission of the State of Oklahoma, entered on April 13, 1926, for the reason that there is no equity jurisdiction for maintaining this bill of complaint since the Supreme Court of Oklahoma had judicially determined the validity of that order.

[fol. 192] 5. The court erred in not dismissing the bill of complaint for want of equity since there was an adequate remedy at law in that

(a) The complainants had a right of appeal from the State Supreme Court to the United States Supreme Court from the judgment affirming the order of The Corporation Commission of the State of Oklahoma;

(b) The validity of order No. 3388 of The Corporation Commission of the State of Oklahoma was interposed by

complainant as a defense at an action at law in the State Court by the defendant for damages:

6. The court erred in denying defendants' motion to amend finding of fact No. V which reads as follows:

"There was no contract between the Oklahoma gas and Electric Company and Wilson & Company, Inc. to furnish gas for any particular period in the future, but if the order complained of had not been made, it could reasonably be expected that Wilson & Company, Inc. would have continued to purchase gas from the Oklahoma Gas and Electric Company at a profit to it of approximately five cents a thousand cubic feet."

by striking out the words

"but if the order complained of had not been made, it could reasonably be expected that Wilson & Company, Inc. would have continued to purchase gas from the Oklahoma Gas and Electric Company at a profit to it of approximately 5 cents a thousand cubic feet."

for the reason that there is no evidence in the record to support the statement and it is mere speculation.

7. The court erred in denying defendants' motion to amend finding of fact No. VI which reads as follows:

"The rates charged by the Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company for gas delivered to it, and the rates charged by the Oklahoma Gas and Electric Company to Wilson & Company, Inc., were those prescribed by the Corporation Commission of Oklahoma."

by striking out the words "and the rates charged by the [fol. 493] Oklahoma Gas and Electric Company to Wilson & Company, Inc." for the reason that there is no evidence of any rates of that company being prescribed by The Corporation Commission.

8. The court erred in denying defendants' motion to amend finding of fact No. VIII finding that when both of the gas companies petitioned the Supreme Court of Oklahoma for review of the order of The Corporation Commission, the order, pending such review, was superseded, and

such review by the Supreme Court was legislative and not judicial, and in 1930 the Supreme Court of Oklahoma affirmed the order of The Corporation Commission, by adding at the end thereof the following:

"The Supreme Court of Oklahoma held:

Assignment of Errors.

"Defendants have assigned fifteen different errors. Both have wisely suggested and have combined and presented said errors under two heads, viz.:

"1. The order of the commission is not supported by the evidence, and is contrary to law.

"2. Said order is violative of section 7, art. 2, of the Constitution of Oklahoma, and of the Fourteenth Amendment to the Constitution of the United States.

"Defendants aver in their first assignment of error: "That the order of the commission is not supported by the evidence."

"We think, after a careful study of the evidence and the findings of fact by the commission, as set out above, the evidence is quite sufficient to sustain said findings, and to warrant the commission in making the order complained of, and that any further discussion as to the sufficiency of the evidence is unnecessary.

"The order of the commission in the present case cannot be said to be a taking of property without due process of law. Hearing was had before a legally constituted tribunal. Notice, an opportunity to be heard, an opportunity to defend and all the proceedings leading up to and including the hearing were regular and denied appellant none of the [fol. 194] rights constituting due process of law, and appeal has been taken to a court authorized by law to review the proceedings and findings of the commission.

"This defendant O. G. & E. also contends and assigns as error "that the order of the Commission depriving it of the right to furnish the plaintiff with gas is violative of



section 7, art. 2, of the Constitution of the State of Oklahoma and of the 14th Amdt. to the Constitution of the United States," in that said order would operate to deprive this defendant of its property without due process of law and to deny it the equal protection of the law."

for the reason that the fact is essential to the determination of this controversy.

9. The court erred in denying defendants' motion to amend finding of fact No. IX which deals with the suit by Wilson & Co., Inc. against Oklahoma Gas and Electric Company and Fidelity and Casualty Company of New York, in the District Court of Oklahoma, and the appeal from the judgment in favor of the plaintiff to the Supreme Court of Oklahoma, by adding at the end thereof the following:

"The State Supreme Court held:

" \* \* \* it is now settled that the decision of this court on appeals from orders of the Corporation Commission affecting rates of public utilities constitutes a judicial determination of the questions involved.' "

for the reason that the fact is essential to the determination of this controversy.

10. The court erred in denying defendants' motion to find that

"Wilson & Co., Inc. of Oklahoma, a Delaware corporation, duly licensed and having a place of business in the Western District of Oklahoma, appeared specially and solely for the purpose of objecting to being sued in said district and moved the court to dismiss the bill of complaint so far as the bill related to it. This District Court overruled its motion, and it then answered the bill of complaint, reserving to itself the benefit of its objection to being sued in the Western District of Oklahoma."

[fol. 195] for the reason that the fact is essential and consistent with the record.

11. The court erred in denying defendants' motion to find that

"The Complainants have not charged or proved that Oklahoma Packing Company brought any action or threatened to bring any action against any of the Complainants to enforce order No. 3388 of the Corporation Commission of Oklahoma."

for the reason that the fact is essential and consistent with the record.

12. The court erred in denying defendants' motion to find that

"The supersedeas bonds filed by the complainant Oklahoma Gas and Electric Company recite that the order of the Corporation Commission had been superseded."

for the reason that the fact is essential and consistent with the record.

13. The court erred in denying defendants' motion to find that

"The Complainant, Oklahoma Gas & Electric Company, undertook in its supersedeas bonds to repay to Wilson & Co., Inc. of Oklahoma the amounts collected in excess of the rates prescribed in the order appealed from in the event of the Supreme Court of Oklahoma affirming the order."

for the reason that the fact is essential and consistent with the record.

14. The court erred in denying defendants' motion to find that

"The Oklahoma Natural Gas Co. and Oklahoma Natural Gas Corporation are not parties to the suit in the District Court of Oklahoma County, Oklahoma, and neither of them has any interest in the subject matter of that litigation."

for the reason that the fact is essential and consistent with the record, and the three-judge court, on final hearing, was of this opinion. (6 Fed. Supp. 893.)

[fol. 196] 15. The court erred in denying defendants' motion to strike conclusion of law No. III holding that the order of the Corporation Commission, No. 3388, was null and void as being contrary to the Fourteenth Amendment

to the Constitution of the United States and of the Constitution of the State of Oklahoma, for the reason that complainants had previously submitted this question to the Supreme Court of the State of Oklahoma where said order was held to be valid under said constitutions, and the complainants cannot now deny the power of the State Supreme Court to decide that question.

16. The court erred in denying defendants' motion to strike conclusion of law No. IV holding that order No. 3388 of the Corporation Commission of Oklahoma deprived the Oklahoma Gas and Electric Company of its remunerative business of supplying gas to Wilson & Co., Inc. in violation of the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of Oklahoma for the reason that the complainants had previously submitted this question to the Supreme Court of the State of Oklahoma where said order was held to be valid under said constitutions, and the complainants cannot now deny the power of the State Supreme Court to decide that question.

17. The court erred in denying defendants' motion to amend conclusion of law No. I which reads as follows:

"That order No. 3388 of the Corporation Commission is a legislative order and that the Supreme Court of Oklahoma, in affirming said order, acted legislatively and only gave legislative effect thereto."

by striking the following words "legislatively and only gave legislative effect thereto" and inserting in lieu thereof, the word "judicially" so as to conform with the construction given to the constitution and statutes of the State of Oklahoma by the Supreme Court of that State.

18. The court erred in denying the defendants' motion to amend conclusion of law No. II which reads as follows:

"That under the Constitution of the United States and under the Constitution and laws of Oklahoma, this court has jurisdiction and it is its duty to judicially determine the validity of said order No. 3388 in this action."

by striking out the words "has jurisdiction and it is its [fol. 197] duty" and inserting in lieu thereof the words "has no power," for the reason that the Supreme Court

of Oklahoma had judicially reviewed said order and held it to be valid.

19. The court erred in denying defendants' motion to make the following conclusion of law:

"That the Oklahoma Gas & Electric Company and the Oklahoma Natural Gas Company, having voluntarily brought the question of the order of the Corporation Commission violating the Fourteenth Amendment of the United States Constitution before the State Supreme Court upon appeal from the Corporation Commission, can not, after that question has been decided adversely, be heard to object to the power of that court to decide the constitutional question presented."

for the reason that it is the only conclusion justified by the record.

20. The court erred in denying defendants' motion to make the following conclusion of law:

"A suit against the Corporation Commission of Oklahoma is not within the jurisdiction of the District Court of the United States."

for the reason that it is the only conclusion justified by the record.

21. The court erred in denying defendants' motion to make the following conclusion of law:

"The State of Oklahoma has not consented to be sued in the name of the Corporation Commission of Oklahoma in the District Court of the United States."

for the reason that it is the only conclusion justified by the record.

22. The court erred in denying defendants' motion to make the following conclusion of law:

"The complainants having failed to allege or prove that Oklahoma Packing Company, formerly named Wilson & Co., Inc. of Oklahoma, an Oklahoma corporation, has taken or threatened to take any action against the complainants or either of them to enforce order No. 3388 of the Corporation Commission of Oklahoma, the bill of complaint must



[fol. 198] be dismissed for want of equity as to Oklahoma Packing Company."

for the reason that it is the only conclusion justified by the record.

23. The court erred in denying defendants' motion to make the following conclusion of law:

"The only liability to which the complainants or either of them may now be subjected is the repayment to Wilson & Co., Inc. of Oklahoma, the excess amounts collected by the Oklahoma Gas & Electric Company over the rates prescribed in the order of the Corporation Commission. Such liability, if any, attaches only to the Oklahoma Gas & Electric Company and to its surety upon the supersedeas bonds."

for the reason that it is the only conclusion justified by the record.

24. The court erred in denying defendants' motion to make the following conclusion of law:

"The contract between the Oklahoma Natural Gas Company and Oklahoma Gas & Electric Company that the Oklahoma Natural Gas Company would not serve gas to Wilson & Co., Inc. of Oklahoma, as found in the findings of fact No. II, impaired the discharge of a duty of the Oklahoma Natural Gas Company to the public. The complainants are in equity seeking the aid of the court in carrying out this illegal contract, and are in equity with unclean hands."

for the reason that it is the only conclusion justified by the record.

25. The court erred in denying defendants' motion to make the following conclusion of law:

"The Oklahoma Natural Gas Company had undertaken to serve industrial gas to persons similarly situated to Wilson & Co. Inc. of Oklahoma."

for the reason that it is the only conclusion justified by the record.

Wherefore the defendants pray that the said decree and order entered by the said District Court for the said West-

[fol. 199] ern District of Oklahoma on September 10, 1937, may be reversed, and the defendants be granted such other and further relief as to the court may seem just and proper.

Dated December 6th, 1937.

G. H. Holloway, W. R. Brown, Solicitors for Defendants.

## IN UNITED STATES DISTRICT COURT

### ORDER ALLOWING APPEAL—Filed December 6, 1937

This day came Oklahoma Packing Company, formerly Wilson & Co., Inc. of Oklahoma, an Oklahoma corporation and Wilson & Co., Inc. of Oklahoma, a Delaware corporation, defendants, by their solicitors, and presented to the Court their petition praying for an appeal from the final order and decree of the Honorable Edgar S. Vaught, Judge of the District Court of the United States for the Western District of Oklahoma made and entered herein on September 10, 1937, ordering and decreeing a permanent and perpetual injunction against said defendants and each of them, their officers, agents and attorneys, and all persons acting or claiming through or under them, or any of them, enjoining them from enforcing or taking any steps to enforce order No. 3388 of the Corporation Commission of the State of Oklahoma, entered on April 13, 1926, or any of the terms or provisions thereof, and further enjoining them from further proceeding in or to prosecute other than to dismiss the same without prejudice, a certain action pending in the District Court of Oklahoma County, Oklahoma, numbered 71898, wherein Wilson & Co., Inc. of Oklahoma is plaintiff, and Oklahoma Gas & Electric Company, a corporation, and The Fidelity & Casualty Company of New York, a corporation, are defendants, and further enjoining them from commencing or prosecuting any other action or proceeding in law or equity, upon or on account of any matters involved in said action in said District Court of Oklahoma County, or at any time or in any manner asserting any rights claimed or involved in said action in the District Court of Oklahoma County, Oklahoma; and also presented its Assignment of Errors, Citation and Cost Bond.

It Is Hereby Ordered that said papers be filed, and it is further ordered:

[fol. 200] 1. That the said petition for appeal be and it is hereby granted, and that the appeal to the United States Circuit Court of Appeals for the Tenth Circuit be and it is hereby allowed as prayed, and that a transcript of record, proceedings and papers upon which said order and decree were made, be duly authenticated and sent to the United States Circuit Court of Appeals for the Tenth Circuit, Denver, Colorado, forthwith upon the filing by the said defendants in the said District Court of a designation of the portion of the record deemed necessary by it to be included in said transcript.

2. That a citation issue directed to the above-named complainants, Oklahoma Gas & Electric Company, a corporation, Oklahoma Natural Gas Company, a corporation, W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp, the Directors of the Oklahoma Natural Gas Company, a dissolved corporation, and Oklahoma Natural Gas Corporation, admonishing them to be in the United States Circuit Court of Appeals for the Tenth Circuit on or before 40 days from the date of this order.

3. That the amount of the bond on appeal be and it hereby is fixed in the sum of Five Hundred Dollars (\$500.00) with good and sufficient surety to be approved by the Court.

Dated this 6th day of December, 1937.

Enter:

Edgar S. Vaught, United States District Judge.

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[Citation, with acceptance of service by counsel for appellee, was filed in the District Court on December 6, 1937.]

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[Bond on appeal in the sum of \$500, with appellant, Wilson & Co., Inc., of Oklahoma, as principal and Seaboard Surety Company, a corporation, as surety, approved by Edgar S. Vaught, District Judge, was filed December 6, 1937.]

[fol. 201] IN UNITED STATES DISTRICT COURT

## ORDER EXTENDING TIME—Filed Jan. 7, 1938

This cause comes on for hearing on the 6th day of January, 1938, on objections to the Narrative Statement lodged by Defendants-Appellants and amendments proposed by Plaintiffs-Appellees in the District Court of the United States for the Western District of Oklahoma and the court being fully advised in the premises and being of the opinion that there is good and sufficient cause shown for enlargement of the time for the Defendants-Appellants to docket the case and file the record with the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit to and including the first day of March, 1938.

It Is Therefore Ordered, that the time for the Defendants-Appellants to docket the case and file the record thereof with the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit is enlarged to and including the first day of March, 1938.

Edgar S. Vaught, Judge of the District Court of the United States for the Western District of Oklahoma.

Approved: W. R. Brown, G. H. Holloway, Attorneys for Defendants-Appellants. R. M. Rainey, I. J. Underwood, Attorneys for Plaintiffs-Appellees.

IN UNITED STATES DISTRICT COURT

## ORDER EXTENDING TIME—Filed Feb. 28, 1938

This cause comes on for hearing on this 28th day of February, 1938, on objections to the Narrative Statement lodged by Defendants-Appellants and amendments proposed by Plaintiffs-Appellees in the District Court of the United States for the Western District of Oklahoma and the court being fully advised in the premises and being of the opinion that there is good and sufficient cause shown for enlargement of the time for the Defendants-Appellants to docket the case and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit to and including the first day of April, 1938.



It Is Therefore Ordered, that the time for the Defendants-Appellants to docket the case and filed the record thereof with the Clerk of the United States Circuit Court of Appeals [fol. 202] for the Tenth Circuit is enlarged to and including the first day of April, 1938.

Edgar S. Vaught, Judge of the District Court of the United States for the Western District of Oklahoma.

Approved: W. R. Brown, G. H. Holloway, Attorneys for Defendants-Appellants. R. M. Rainey, I. J. Underwood, by Calvin Jones, Attorneys for Plaintiffs-Appellees.

#### IN UNITED STATES DISTRICT COURT

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL—Filed Dec. 20, 1937

To the Clerk of the United States District Court for the Western District of Oklahoma:

You are hereby requested to make a transcript of the record in the above-entitled cause to be filed in the United States Circuit Court of Appeals for the Tenth Circuit by reason of appeal allowed from the order and decree entered by the District Court for the Western District of Oklahoma in this cause.

You will please include in said transcript the following:

First. Bill of complaint and exhibits attached thereto.

Second. Subpoena with Marshal's return.

Third. Temporary restraining order dated May 20, 1932.

Fourth. Motion of Wilson & Co., Inc. of Oklahoma, appearing specially for the purpose of objecting to being sued in the Western District of Oklahoma.

Fifth. Answer of Oklahoma Packing Company and the exhibits attached thereto.

Sixth. Answer of Corporation Commission, et al, adopting answer of Oklahoma Packing Company.

Seventh. Findings of fact and conclusions of law on application for temporary injunction.

Eighth. Opinion on application for injunction and motion to dismiss bill.

Ninth. Order denying application for temporary injunction dated November 28, 1932.

[fol. 203] Tenth. Order overruling motion to dismiss bill dated November 28, 1932.

Eleventh. Answer of Wilson & Co., Inc., of Oklahoma, adopting answer of Oklahoma Packing Company.

Twelfth. Supplemental answer of Wilson & Co., Inc., of Oklahoma.

Thirteenth. Findings of fact and conclusions of law on final hearing before three-judge court.

Fourteenth. Opinion of the three-judge court on final hearing.

Fifteenth. Petition for rehearing.

Sixteenth. Order and opinion of the three-judge court denying the petition for rehearing.

Seventeenth. Decree of the three-judge court dismissing bill of complaint.

Eighteenth. Mandate or procedendo from United States Supreme Court.

Nineteenth. Order giving leave to complainants to file an amendment to the complaint.

Twentieth. Amendment to the bill of complaint.

Twenty-first. Motion of the Corporation Commission, et al., to dismiss the bill of complaint.

Twenty-second. Order of Judge Vaught as to the motion of the Corporation Commission, et al., to dismiss.

Twenty-third. Findings of fact and conclusions of law of District Judge Edgar S. Vaught.

Twenty-fourth. Opinion of Judge Vaught on final hearing.

Twenty-fifth. Decree of Judge Vaught permanently enjoining Wilson & Co., Inc. of Oklahoma, and Oklahoma Packing Company, defendants, dated September 10, 1937.

Twenty-sixth. Motion of defendants to modify findings of fact and conclusions of law and request for additional findings of fact and conclusions of law.

Twenty-seventh. Order of Judge Vaught overruling defendants' motion to modify and add findings of fact and conclusions of law, dated September 13, 1937.

Twenty-eighth. Condensed narrative statement of the evidence as approved by the Court.

Twenty-ninth. Petition for appeal.

Thirtieth. Order allowing appeal.

Thirty-first. Assignment of error and prayer for reversal.

Thirty-second. Citation and acknowledgment of service.

Thirty-third. Bond on appeal.

Thirty-fourth. Praecipe for transcript of record on appeal.

Thirty-fifth. Clerk's certificate to the transcript.

We desire that the transcript of record on appeal be printed under the supervision of the Clerk of the United States Court of Appeals for the Tenth Circuit and under the rules of said court.

G. H. Holloway, W. R. Brown, Solicitors for Defendants.

#### Acknowledgment of Service

Due service of the above and foregoing praecipe for transcript of record on appeal herein, and receipt of a true copy thereof, is hereby acknowledged this 20th day of December, 1937.

R. M. Rainey, I. J. Underwood, Solicitors for Oklahoma Gas and Electric Company, a corporation; Oklahoma Natural Gas Company, a corporation; W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp, the Directors of the Oklahoma Natural Gas Company, a dissolved corporation, and Oklahoma Natural Gas Corporation, Complainants.

[fols. 205-206] Clerk's Certificate to foregoing transcript omitted in printing.





And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit, viz:

(Order of Submission)

Sixth Day, September Term, Monday, September 19th, A. D. 1938. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Robert L. Williams, Circuit Judges.

This cause came on to be heard and was argued by counsel, William R. Brown, Esquire, appearing for appellants, Streeter B. Flynn, Esquire, and I. J. Underwood, Esquire, appearing for appellees.

On motions, appellants were granted leave to file twenty printed copies of a reply brief in this cause and appellees were granted leave to file twenty printed copies of a brief in reply thereto within ten days from this day.

Thereupon this cause was submitted to the court.

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[Opinion.]

No. 1687—September Term, 1938.

[December 19, 1938.]

W. R. Brown (Paul Ware and G. H. Holloway were with him on the brief) for appellants.

Streeter B. Flynn and I. J. Underwood (Robert M. Rainey, Calvin Jones, R. M. Campbell, Rainey, Flynn, Green & Anderson, and Allen, Underwood & Canterbury were with them on the brief) for appellees.

Before Phillips, Bratton and Williams, Circuit Judges.

Phillips, Circuit Judge, delivered the opinion of the court.

The Oklahoma Natural Gas Company, an Oklahoma corporation, hereinafter called the Gas Company, was engaged in the business of producing, transporting, and selling natural gas. It held local franchises for the sale and distribution of gas in certain cities and towns in Oklahoma, but had no local franchise in Oklahoma City.

In September, 1926, the Oklahoma Natural Gas Corporation, a Maryland corporation, hereinafter called the Gas Cor-

poration, purchased the properties of the Gas Company and thereafter engaged in the transmission, sale, and distribution of gas in Oklahoma.

The Oklahoma Gas and Electric Company, an Oklahoma corporation, hereinafter called the Electric Company, was engaged in the sale and distribution of natural gas to domestic and industrial consumers in Oklahoma City and the immediate vicinity thereof, and in other cities and towns in Oklahoma operating under local franchises.

In June, 1921, the Corporation Commission of Oklahoma fixed a gate rate for gas sold to local distributing companies. Theretofore the Gas Company had supplied gas to the Electric Company on a percentage basis. Upon the promulgation of the gate rate order the Gas Company established gas measuring stations at points adjacent to but outside the city limits of Oklahoma City and continued to supply gas to the Electric Company at such measuring stations at the gate rate.

In September, 1924, the Gas Company, with the approval of the Corporation Commission, put into effect an industrial gas rate to consumers located outside the city limits of the cities where the Gas Company held local franchises. The rate was on a monthly basis and was conditioned on a minimum consumption of thirty million cubic feet per month. The rate was thirty-eight cents per thousand cubic feet for the first one hundred thousand cubic feet and fifteen cents per thousand cubic feet for gas in excess thereof. On January 1, 1926, with the approval of the Corporation Commission, the rate was reduced to thirty-five cents per thousand cubic feet for the first one hundred thousand cubic feet and the minimum was reduced to fifteen million cubic feet. Under these rates the Gas Company furnished gas to industrial consumers outside the city limits of cities and towns where it sold and distributed gas under local franchises.

After the measuring stations at the city gates were established there were certain gas consumers living outside the points where such measuring stations were located that had theretofore been served by the Electric Company. It was agreed between the Electric Company and the Gas Company with the approval of the Corporation Commission that such consumers should be supplied by the Gas Company. In accordance with such agreement the Gas Company furnished gas to such consumers.

Wilson & Company, Inc., of Oklahoma, hereinafter called the Oklahoma Company, is a corporation organized under the laws of Oklahoma. Wilson & Company, Inc., of Oklahoma, hereinafter called the Delaware Company, is a corporation organized under the laws of Delaware. The Oklahoma Company was engaged in the meat packing business. Its plant was located outside the city limits of Oklahoma City but within the territory lying between the city limits and the measuring stations.

Prior to March 1, 1928, neither the Gas Company nor the Gas Corporation served or offered to serve consumers located in Oklahoma City or within the territory surrounding Oklahoma City lying between the city limits and the measuring stations. That territory was being served by the Electric Company. Prior to 1919 the Electric Company extended its distribution lines to the district where the plant of the Oklahoma Company was located and distributed gas to consumers in that district.

In 1924 the Electric Company built a service line from one of its distributing lines to the Oklahoma Company plant and began furnishing it gas for industrial purposes.

On April 13, 1926, the Corporation Commission, upon complaint of the Oklahoma Company, promulgated its order No. 3388 which required the Gas Company to furnish the Oklahoma Company with gas at the industrial rates. The Gas Company and the Electric Company petitioned the Supreme Court of Oklahoma to review order No. 3388, and the Supreme Court awarded supersedeas suspending the operation of such order. On April 29, 1930, the Supreme Court affirmed such order.

On December 3, 1931, the Oklahoma Company transferred its packing plant and other property, including any claim on the supersedeas bonds, to the Delaware Company. Thereafter, the name of the Oklahoma Company was changed to Oklahoma Packing Company.

On March 1, 1928, the Gas Corporation purchased the natural gas distributing systems of the Electric Company in the cities and towns in Oklahoma in which the latter company held franchises, and thereafter operated such systems. The Gas Corporation on the acquisition of such systems put in effect in such cities and towns its industrial gas rate. From

and after March 1, 1928, the Gas Corporation furnished gas to the Oklahoma Company and its successor, the Delaware Company, at such industrial rate.

On December 3, 1931, the Delaware Company, as successor to the Oklahoma Company, brought an action against the Electric Company and the Fidelity & Casualty Company of New York upon the bonds given to supersede order No. 3388, in the district court of Oklahoma County, numbered 71,898 on the docket of that court. On April 6, 1933, a judgment was entered in such action in favor of the Delaware Company and against the Electric Company and the Fidelity & Casualty Company. In such action the state court held it had jurisdiction to determine the validity of order No. 3388. The Electric Company and the Fidelity & Casualty Company duly appealed from such judgment and the execution of the judgment was duly superseded pending appeal.

On July 24, 1930, the Gas Company, then a dissolved corporation, its directors, the Gas Corporation, and the Electric Company brought a suit against the Oklahoma Company in the District Court of the United States for the Western District of Oklahoma, numbered 1144 Equity on the docket of that court, wherein they challenged the validity of order No. 3388, and sought an injunction against the further prosecution of cause No. 71,898. The lower court dismissed the bill. On appeal this court held the action of the Supreme Court of Oklahoma in affirming order No. 3388 was legislative in character and that the plaintiffs were entitled to challenge the validity of such order in an independent proceeding in equity. See *Oklahoma Gas & Electric Co. v. Wilson & Company*, 10 Cir., 54 F. 2d 596. After remand further proceedings were had in cause No. 1144. On May 19, 1932, the plaintiffs therein dismissed the suit without prejudice.

On May 20, 1932, the Electric Company, the Gas Corporation, and the Gas Company, a dissolved corporation, and its directors, brought this suit against the Oklahoma Company, the Delaware Company, the Corporation Commission of the state of Oklahoma, and J. Berry King, Attorney General of Oklahoma. Certain proceedings were had therein before a three-judge court. On appeal from a decree entered by the three-judge court the Supreme Court of the United States held that the action did not fall within the purview of 28



U. S. C. A. § 380. It vacated the decree and remanded the cause for further proceedings before a single judge. . .

On September 15, 1936, the Supreme Court of Oklahoma reversed the judgment recovered by Wilson & Company, Inc., of Oklahoma, in cause No. 71,898, and remanded the cause with directions to the state district court to stay the action pending the decision in the instant case.

In the instant case, the court held that the judgment of the Supreme Court of Oklahoma in affirming order No. 3388 was legislative in character; that the order was invalid because the Gas Company prior to the making thereof had not served nor professed to serve gas consumers within Oklahoma City or in the territory between the measuring stations and the city limits and was not required to extend its service to the Oklahoma Company. It entered its decree adjudging order No. 3388 invalid and restraining the Delaware Company from further prosecuting cause No. 71,898. The Oklahoma Company and the Delaware Company have appealed.

In the instant case, the Delaware Company filed a special appearance objecting to the venue on the ground it was not an inhabitant of the Western District of Oklahoma. The action of the trial court in overruling the motion is urged as error here.

Section 51 of the Judicial Code, 28 U. S. C. A. 112, in part reads:

"... no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

In the instant case, jurisdiction was based upon the fact that the suit was one arising under the Constitution of the United States, namely, that the enforcement of order No. 3388 would deprive the Gas Corporation of its property without due process of law contrary to the provisions of the Fourteenth Amendment.

Section 43 of Article 9 of the Oklahoma Constitution as

originally adopted in part provides that "every foreign corporation . . . before being licensed to do business in the State," shall designate an agent residing in the state for service of process and that "Suit may be maintained against a foreign corporation in the county where an agent of such corporation may be found, or in the county of the residence of plaintiff, or in the county where the cause of action may arise."

Section 130, O. S. 1931, which has been in effect since June 10, 1909, in part reads as follows:

"Every foreign corporation shall, before it shall be authorized or permitted to transact business in this State . . . appoint an agent who shall be a citizen of the State and reside at the state capital, upon whom service of process may be made in any action in which said corporation shall be a party; and action may be brought in any county in which the cause of action arose. . ."

The trial court found that prior to the commencement of the instant case the Delaware Company duly qualified as provided by the statutes of Oklahoma to do a local business as a foreign corporation in Oklahoma, and as provided by the statutes of Oklahoma duly filed a certificate designating an agent on whom process, issued in actions instituted in Oklahoma against the Delaware Company, might be served and consenting that actions might be brought against it in the county in which the cause arose. Such finding was not excepted to nor otherwise challenged below.

A state may withhold from a foreign corporation the right to do an intrastate business therein or condition such right as it sees fit so long as it does not impose as a condition the surrender of a constitutional right.<sup>1</sup>

The provision of Section 51, supra, does not limit the general jurisdiction of the district courts, but merely confers a personal privilege on the defendant which he may waive or

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<sup>1</sup>Hanover Fire Ins. Co. v. Harding, 272 U. S. 494, 507;

Atlantic Refining Co. v. Virginia, 58 S. Ct. 775.—U. S. —;

Paul v. Virginia, 8 Wall. 168;

Western Union Tel. Co. v. Kansas, 216 U. S. 1, 33;

Power Manufacturing Co. v. Saunders, 274 U. S. 490, 496, 497;

Terral v. Burke Construction Co., 257 U. S. 529;

Washington v. Superior Court, 289 U. S. 361, 364.

assert at his election.<sup>2</sup> The waiver may occur either before or after the commencement of the suit.<sup>3</sup>

Where a foreign corporation qualifies to do business in a state in accordance with the statutes of the state, it assents to all the reasonable conditions imposed by such statutes.<sup>4</sup>

The condition imposed that the Delaware Company consent to be sued in Oklahoma was a reasonable one. It was to enable residents of Oklahoma to obtain redress against foreign corporations doing business in Oklahoma in the state and federal courts in Oklahoma upon causes of action arising in Oklahoma. Ex parte Schollenberger, 96 U. S. 369, 376, 377.

Where a foreign corporation qualifies to do business in a state in accordance with the statutes of the state, it thereby assents to be sued in the state and federal courts of competent jurisdiction therein, if the statutes of the state respecting the entry of a foreign corporation so provide.<sup>5</sup>

Prior to 1887 when the statute (Act of March 3, 1875, 18 Stat. 470) allowed suit in the district of which the defendant "is an inhabitant, or in which he shall be found," it was held that a corporation, which in order to do business in the state, appointed an agent for service of process therein, thereby "consented to be found" in the state and could be sued there in the federal court.<sup>6</sup>

After the words above italicized were omitted by the Act of March 3, 1887, 28 U. S. C. A. § 112, it was held that the mere appointment of an agent for service of process, or the doing of business in a foreign state through an agent, did not imply

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<sup>2</sup>Lee v. Chesapeake & Ohio Ry. Co., 260 U. S. 653, 655;

In re Moore, 209 U. S. 490, 502;

Brooks v. Yarbrough, 10 Cir., 37 F. 2d 527, 531;

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<sup>3</sup>Commercial Casualty Co. v. Consolidated Stone Co., 278 U. S. 177, 179, 180;

Ex parte Schollenberger, 96 U. S. 369;

McClellan v. State of Mississippi, 5 Cir., 96 F. 2d 741, 743.

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<sup>4</sup>Washington v. Superior Court, 289 U. S. 361, 364;

Lafayette Insurance Co. v. French, 18 How. 404, 408;

St. Clair v. Cox, 106 U. S. 350, 356;

Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 614;

Old Wayne Mut. Life Assn. v. McDonough, 204 U. S. 8, 22;

Commercial Mutual Accident Co. v. Davis, 213 U. S. 245, 254.

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<sup>5</sup>Ex parte Schollenberger, 96 U. S. 369;

Railroad Company v. Harris, 12 Wall. 65, 81;

Railroad Company v. Koontz, 104 U. S. 5, 10.

See, also, O'Donnell v. Slade, D. C. Pa., 5 F. Supp. 265.

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<sup>6</sup>Ex parte Schollenberger, 96 U. S. 369.

an agreement to waive the venue privilege accorded by 28 U. S. C. A. § 112.<sup>7</sup>

Here, the provisions of the Oklahoma Constitution and statutes respecting the admission of foreign corporations to do business in the state provided that such corporations may be sued in the county in which the cause of action arose. By complying with those provisions and obtaining a license to transact a local business in Oklahoma, the Delaware Company did more than appoint a statutory agent for service of process; it assented to be sued in any court, state or federal, whose territorial jurisdiction embraced the county in which the cause of action arose. The cause of action here sued on arose in Oklahoma County. The Western District of Oklahoma embraces that county and a regular term of the court is held at Oklahoma City in that county. We conclude that the Delaware Company, by complying with the provisions of Oklahoma law respecting the domestication of foreign corporations, waived its right to object to the venue of the court and consented to be sued in the District Court of the United States for the Western District of Oklahoma.

Counsel for the Oklahoma Company and the Delaware Company contend that in reviewing order No. 3388, the Supreme Court of Oklahoma acted judicially and that its judgment affirming that order is conclusive as to the validity of the order under the doctrine of res judicata. The Oklahoma Company was a party defendant in cause No. 1144. The Delaware Company is the successor to and claims through the Oklahoma Company. On appeal from the judgment of the district court in cause No. 1144 this court held that the review by the Supreme Court of Oklahoma was legislative in character. See *Oklahoma Gas & Electric Company v. Wilson & Company*, 10 Cir., 54 F. 2d 596. Furthermore, the Supreme Court of Oklahoma in its opinion reversing the judgment in cause No. 71,898, *Oklahoma Gas & Electric Co., et al., v. Wilson & Co., Inc.*,—Okl.—, 63 P. 2d 703, 704, 705, said:

"In the instant case, in view of the fact that defendants' right to a judicial remedy in the state courts was uncertain, the federal court accepted jurisdiction of the cause instituted therein by defendants. That remedy was avail-

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<sup>7</sup>In re *Keasbey & Mattison Co.*, 160 U. S. 221, 229;

*Beech-Nut Packing Co. v. P. Lorillard Co.*, D.C.N.Y., 287 F. 271, 272.

*McClean v. State of Mississippi*, 5 Cir., 96 F. 2d 741, 743.



able to them as the only certain method of obtaining a judicial determination of the validity of the commission's order. The suit was a direct attack upon such order, and until its validity was established in that suit, the state court was without jurisdiction to proceed with an action based upon such order. This for the reason that where direct attack in equity is made upon the order of the commission the defendants' liability on such order is not finally determined judicially until final determination of the equitable action. See *Pioneer Tel. & Tel. Co. v. State* 40 Okl. 417, 138 P. 1033.

"The trial court erred in overruling defendants' motion to stay proceedings in this cause pending decision in the case in the federal court. The judgment is therefore reversed and the cause remanded, with directions to stay the action in accordance with defendants' motion."

The trial court made the following finding of fact:

"The Oklahoma Natural Gas Company has not served, nor professed to serve gas to consumers upon the lines of the Oklahoma Gas and Electric Company located within the city gates, that is, beyond the point where the gas sold by the Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company is measured. The Oklahoma Natural Gas Company sold no gas to Wilson & Company, Inc., prior to the order complained of."

This finding was supported by substantial evidence and was not excepted to nor otherwise challenged below.

The Delaware Company and the Oklahoma Company moved to strike the following conclusion of law:

"That the Oklahoma Natural Gas Company has never held itself out and had never agreed or professed to serve gas to Wilson & Company or any consumer similarly situated to Wilson & Company, Inc., and was not obligated by virtue of any franchise to serve the said Wilson & Company, Inc., and, therefore, said Order No. 3388 is null and void, as being contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States and of the Constitution of the State of Oklahoma."

The action of the trial court in denying the motion is urged as error here.

The facts found supported the conclusions of law under the applicable law as announced in the Oklahoma decisions. *Oklahoma Natural Gas Co. v. Corporation Commission, et al.*, 88 Okl. 51, 211 P. 401; *In re Vance*, 115 Okl. 8, 241 P. 164.

In *Oklahoma Natural Gas Co. v. Corporation Commission, et al.*, *supra*, p. 402, the court said:

"But the appellant has not undertaken or professed to serve the city of Chickasha, neither does it profess to serve the state at large. The fact that it is a public utility does not necessarily cast upon it the duty of serving the public at large. This duty is not to all men, but to a certain public limited by its profession. *Wyman on Public Service Corporations*, Sec. 344; . . . To compel the appellant to extend its service to a city, town, or community it has not undertaken or professed to serve, and which it does not desire to serve, is tantamount to an appropriation of private property for public use without just compensation."

In the *Vance* Case it was held that:

"The Corporation Commission has no authority to require a public utility to furnish natural gas to people living outside the city limits where the utility has never professed or undertaken to serve the people of that community generally, even though it may appear that the gas company has a pipe line in close proximity to the property of such persons."

28 U. S. C. A. § 379, Section 265 of the Judicial Code, reads as follows:

"Same; stay in State courts. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

Counsel for the Oklahoma Company and the Delaware Company contend that the provisions of Section 379, *supra*, prohibited the court from enjoining the further prosecution of cause No. 71,898.

The restraint was against the parties and not against the state court. *Steelman v. All Continent Co.*, 301 U. S. 278, 291.

The Gas Company and the Electric Company had exhausted their administrative remedies respecting order No. 3388. If they disobeyed it and it was ultimately adjudged to be valid, they would be subject to large fines and penalties. The enforcement of the order if invalid would result in the taking of the Gas Corporation's property without due process of law. A bill in equity to enjoin the enforcement of the order was the appropriate remedy.<sup>8</sup> The order being invalid for the reasons heretofore stated, the Gas Company and the Gas Corporation were entitled to a decree enjoining its enforcement.

One question remains, were the Gas Corporation, the Gas Company, and the Electric Company entitled to enjoin the further prosecution of cause No. 71,898? It may be conceded that ordinarily the right to set up the decree in the instant case as res judicata would afford an adequate remedy. The causes of action on the supersedeas bonds are necessarily predicated on order No. 3388. That order being invalid, those causes of action necessarily must fail. Indeed, the Supreme Court of Oklahoma in *Oklahoma Gas & Elec. Co. v. Wilson & Co., Inc.*, supra, held that until the validity of order No. 3388 was established in the instant suit "the state court was without jurisdiction to proceed with an action based upon such order." The validity of order No. 3388 not having been established and its invalidity having been adjudged, there remains no basis for the state court proceeding. Its prosecution could be for no other purpose than vexation. Furthermore, claims on the supersedeas bonds were transferred to the Delaware Company, and it is the plaintiff in cause No. 71,898. It did not by answer or otherwise raise the question of the adequacy of a legal remedy. It must be deemed, therefore, to have waived it. *Foltz v. St. Louis & S. F. Ry. Co.*, 8 Cir., 60 F. 316, 322. Under all the circumstances we are of the opinion there was no prejudicial error in enjoining the further prosecution of cause No. 71,898.

Where a chancellor has considered conflicting evidence and has made his findings and decree thereon, they must be regarded as presumptively correct, and unless a serious mistake has been made in the consideration of the evidence or an obvious error has intervened in the application of the law, the

<sup>8</sup>*Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 227, 228.

*Mississippi R. R. Comm. v. Mobile & Ohio R. R. Co.*, 244 U. S. 388, 392.

decree should be permitted to stand.) We are of the opinion that the court below made no serious mistake in the consideration of the evidence or any obvious error in the application of the law thereto, and that the decree should be and it is **AFFIRMED.**

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"Standard Oil Co. of Colorado v. Standard Oil Co., 10 Cir., 72 F. 2d 524, 527;

Stewart v. American Life Ins. Co., 10 Cir., 89 F. 2d 743, 747;

Stearns v. Central Petroleum Co., 10 Cir., 93 F. 2d 638, 641;

Whitchurch v. Crawford, 10 Cir., 92 F. 2d 249, 254.

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(Decree.)

Forty-second Day, September Term, Monday, December 19th, A. D. 1938. Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said district court in this cause be and the same is hereby affirmed; and that Oklahoma Gas and Electric Company, a corporation, et al., appellees, have and recover of and from Oklahoma Packing Company, formerly Wilson & Company, Inc., of Oklahoma, an Oklahoma Corporation, et al., appellants, their costs herein.

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(On January 24, 1939, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and decree of said court, was issued to the United States District Court.)

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(Clerk's Certificate.)

United States Circuit Court of Appeals, Tenth Circuit.

¶ Albert Trego, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains a full, true and complete copy of the transcript of the record from the District Court of the United States for the Western District of Oklahoma, and full, true and complete copies of certain pleadings, record entries and proceedings, including the opinion, (except full captions, titles and endorse-



ments omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 1687, wherein Oklahoma Packing Company, formerly Wilson & Company, Inc., of Oklahoma, an Oklahoma Corporation, et al. were appellants and Oklahoma Gas and Electric Company, a corporation, et al., were appellees, as full, true and complete as the originals of the same remain on file and of record in my office.

(Seal, U. S. Circuit  
Court of Appeals,  
Tenth Circuit.)

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 2nd day of March, A. D. 1939.

ALBERT TREGO,  
Clerk of the United States Circuit  
Court of Appeals, Tenth Circuit.

[fol. 220] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed April 17, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 43,235. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 19. Oklahoma Packing Company, formerly Wilson & Co., Inc., of Oklahoma, et al. Petitioners, vs. Oklahoma Gas and Electric Company, et al. Petition for a writ of certiorari and exhibit thereto. Filed March 15, 1939. Term No. 19, O. T., 1939.

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CHARLES ELMORE CROPLEY  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1938.

No. [REDACTED] 19

OKLAHOMA PACKING COMPANY, FORMERLY WILSON  
& CO., INC. OF OKLAHOMA, AN OKLAHOMA CORPORATION,  
AND WILSON & CO., INC. OF OKLAHOMA, a Delaware corporation,

*Petitioners,*

*vs.*

OKLAHOMA GAS AND ELECTRIC COMPANY, A CORPORATION;  
OKLAHOMA NATURAL GAS COMPANY, A CORPORATION;  
W. T. PHILLIPS, JR., H. J. CRAWFORD, J. V. RITTS,  
LEONARD C. RITTS, R. W. HANNAN, A. W. LEONARD,  
AND R. C. SHARP, THE DIRECTORS OF THE OKLAHOMA  
NATURAL GAS COMPANY, A DISSOLVED CORPORATION;  
AND OKLAHOMA NATURAL GAS CORPORATION,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH  
CIRCUIT.

W. R. BROWN,  
PAUL WARE,

*Counsel for Petitioners.*





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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1938.

No. \_\_\_\_\_

OKLAHOMA PACKING COMPANY, FORMERLY WILSON  
& CO., INC. OF OKLAHOMA, AN OKLAHOMA CORPORATION,  
AND WILSON & CO., INC. OF OKLAHOMA, a Delaware corporation,

*Petitioners,*

vs.

OKLAHOMA GAS AND ELECTRIC COMPANY, A CORPORATION;  
OKLAHOMA NATURAL GAS COMPANY, A CORPORATION;  
W. T. PHILLIPS, JR., H. J. CRAWFORD, J. V. RITTS,  
LEONARD C. RITTS, R. W. HANNAN, A. W. LEONARD,  
AND R. C. SHARP, THE DIRECTORS OF THE OKLAHOMA  
NATURAL GAS COMPANY, A DISSOLVED CORPORATION;  
AND OKLAHOMA NATURAL GAS CORPORATION.

*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE TENTH CIRCUIT.

*To The Honorable Justices of the Supreme Court  
of the United States:*

The petition of Wilson & Co., Inc. of Oklahoma and Oklahoma Packing Company, petitioners in the above captioned case, respectively shows:

## STATEMENT OF THE MATTER INVOLVED.

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An order of the Oklahoma Corporation Commission, affirmed by the Supreme Court of the State of Oklahoma, directing Oklahoma Natural Gas Company, a public utility, to serve fuel gas to Wilson and Company, an industrial consumer, at its voluntary and previously published rate, has been held invalid by a decree of the United States District Court, which enjoined the enforcement of that order and also an action at law in the Oklahoma court to recover the overcharges collected subsequent to the date of the Commission's order. This decree was affirmed by the Tenth Circuit Court of Appeals, and is in direct conflict with the law of the State of Oklahoma as previously determined by its Supreme Court, and, in effect, constitutes an assumption of appellate jurisdiction by the Federal district court to review a judgment of the Supreme Court of Oklahoma.

A further matter involved is the objection to the venue of the District Court over petitioner, the Delaware corporation, which promptly appeared specially and objected on the ground that, in this suit, which is based on a federal question, it could not be sued in the district in which it was not an inhabitant (R. 38). The Circuit Court of Appeals affirmed (R. 218, 214) the judgment of the District Court overruling the objection (R. 59, 65, 118).

The opinion of the Circuit Court of Appeals appears in the record (R. 207) and in the reports. *Oklahoma Packing Co., et al. v. Oklahoma Gas & Electric Co., et al.*, 100 F. (2d) 770.

The opinion of the District Court appears only in the record (R. 97).

The controversy between the parties commenced with the



complaint of Wilson and Company (R. 12) against Oklahoma Natural Gas Company and Oklahoma Gas & Electric Company, public utilities, before the Corporation Commission of Oklahoma, wherein Wilson and Company charged that it operated a packing plant outside of the city limits of Oklahoma City and about 450 feet from the pipe line of the general system of Oklahoma Natural; and that because of an agreement between the two utility companies, it was compelled to pay Oklahoma Gas & Electric Company a rate five cents in excess of that charged other industries similarly situated. After full hearing of the evidence, the Commission made its findings of fact one of which was that the Oklahoma Natural Gas Company, under the circumstances, should be required to supply the Wilson plant with similar quantities of gas to that supplied other institutions located along its pipe line outside of incorporated cities, upon the same terms and conditions (R. 24-25). The Commission thereupon entered its Order No. 3388 requiring that utility company to serve Wilson and Company with fuel gas at its industrial rate (R. 16). That rate was not and is not in dispute since it had been previously and voluntarily adopted by the Oklahoma Natural for industrial users located on its general system outside of the city limits (R. 91, 122, 133, 135).

Upon appeal from the Commission's Order No. 3388 to the Supreme Court of Oklahoma, the Oklahoma Natural and the Oklahoma Gas and Electric Companies challenged the validity of that order on the ground that it was not supported by the evidence, contrary to law, and that it was a taking of property without due process of law. The Oklahoma Supreme Court affirmed the order and specifically disposed of each of these contentions. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 146 Okla. 272. The utility companies failed to take an appeal from that decision to the United States Supreme Court.

The same gas companies thereafter filed the present bill (R. 1) in the United States District Court and assailed the validity of Order No. 3388, as affirmed by the Oklahoma Supreme Court, upon the same grounds urged by them in the State Supreme Court (R. 7-8) and sought to enjoin the Wilson companies and state officers from enforcing that order. The Wilson companies answered that the decision of the Supreme Court of Oklahoma was *res judicata* of all issues in this suit and that the Federal District Court had no jurisdiction to review that judgment (R. 51, pars. o and p, R. 66). The utility companies alleged that the validity of the order had not been judicially determined (R. 7). The bill further sought to enjoin (R. 8) an action at law previously filed in the Oklahoma Court by Wilson and Company against the Oklahoma Gas & Electric Company to recover the excess charges paid the latter company for gas (R. 26). Wilson and Company's position as to this part of the bill was that, under section 265, Judicial Code, the *in personam* action in the State court (so held by the three judge court (R. 78); *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 6 F. Supp. 893, 895) is not within any exceptions to that section and cannot be enjoined by a Federal District Court.

The Circuit Court of Appeals has affirmed the judgment and decree of the District Court which declared invalid the Commission's Order No. 3388 affirmed by the Oklahoma Supreme Court on the grounds alleged (R. 97), and enjoined the further prosecution of the action in the State Court (R. 111). An injunction against state officers was denied.

In holding the order invalid the Circuit Court of Appeals (R. 214) and the District Court (R. 96, 105) followed language in a former opinion of the said Court of Appeals (*Oklahoma Gas & Electric Company v. Wilson & Co., Inc.*, 54 F. (2d) 596) which stated that the Supreme Court of

Oklahoma acted only legislatively in reviewing orders of the Oklahoma Corporation Commission. The language in that case has been expressly held by the Supreme Court of Oklahoma to be an incorrect statement of the law of that State. *Oklahoma Cotton Ginners' Ass'n. v. State*, 174 Okla. 243 at 251. The settled law of Oklahoma as announced in the *Ginners'* case and followed in the law action now enjoined, is that decisions of the Oklahoma Supreme Court on appeals from orders of the Corporation Commission affecting public utilities, such as gas companies, constitute a judicial determination of the questions involved. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 178 Okla. 604, at 605.

The prior suit reported in 54 F. (2d) 596 was similar to the present one (R. 188) and the Tenth Circuit Court of Appeals reversed a decree of the District Court dismissing the bill. Upon remand, a three judge court was convened which held it was without jurisdiction. The bill was dismissed without prejudice and the present suit filed.

The present case has been before this Court on an appeal from the District Court, three judges sitting, and the only question decided was that a three judge court had no jurisdiction. *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U. S. 386.

## JURISDICTION.

The date of the decision and judgment of the Circuit Court of Appeals for the Tenth Circuit is December 19, 1938 (R. 218).

The jurisdiction of the Court is invoked under Section 240(a) of the Judicial Code as amended by an Act of February 13, 1925.

## QUESTIONS PRESENTED.

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The following questions are presented:

1. Whether the review and decision by the Supreme Court of Oklahoma affirming Order No. 3388 of the Corporation Commission affecting public utilities was a judicial determination of the validity of the order under the laws of Oklahoma and *res judicata* of all the issues in the instant suit.

2. Whether the United States District Court is bound by the decisions of the Supreme Court of Oklahoma, which is the highest court in that state, in the construction of the Constitution and laws of the State of Oklahoma as to the character of the functions exercised by it in reviewing orders of the Corporation Commission affecting public utilities.

(a) Under the above the incidental question is raised whether the Tenth Circuit Court of Appeals and the District Court should have followed the decision of the Supreme Court of Oklahoma even though an earlier decision of that Circuit Court of Appeals (54 F. (2d) 596) is in direct conflict with those of the Supreme Court of Oklahoma.

3. Whether the Federal District Court is prohibited by section 265, Judicial Code, from granting an injunction against the further prosecution of the *in personam* action at law in the State Court to recover the overcharges collected by the Oklahoma Gas & Electric Company from Wilson & Co.

4. Whether the United States District Court, Western District of Oklahoma, has venue in this civil suit based on a federal question over petitioner, a Delaware corporation, qualified to do business in Oklahoma, with a usual place of business in that district, when petitioner first appeared specially and objected to being sued in that district on the ground that it was not an inhabitant thereof, which objection has never been waived.



## REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

---

The following reasons are relied on for allowance of the writ:

1. The Tenth Circuit Court of Appeals, in determining that the Supreme Court of Oklahoma functioned legislatively in reviewing Order No. 3388 of the Corporation Commission affecting a public utility, decided an important question of construction of the Constitution and laws of the State of Oklahoma in a way which is in direct conflict with the applicable decisions of the Supreme Court of Oklahoma more particularly shown in *Oklahoma Cotton Ginners' Ass'n v. State*, 174 Okla. 243, and *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 178 Okla. 604.

2. The Tenth Circuit Court of Appeals, in determining that Section 265, Judicial Code did not apply to this suit, decided a federal question in a way which is in conflict with the applicable decisions of this Court more particularly shown in *Hill v. Martin*, 296 U. S. 393, and *Grubb v. Public Utilities Com. of Ohio*, 281 U. S. 470.

3. The Tenth Circuit Court of Appeals, in determining that petitioner, a Delaware corporation, by complying with the provision of Oklahoma law respecting the domestication of foreign corporations consented to be sued in the United States District Court for the Western District of Oklahoma, decided a federal question in a way which is in conflict with the applicable decisions of this Court, and particularly *Southern Pacific Co. v. Denton*, 146 U. S. 202.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this

Honorable Court, directed to the United Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record in proceedings herein; and that the decree of said Circuit Court of Appeals be reversed by this Honorable Court and your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

W. R. BROWN,

PAUL WARE,

*Counsel for Petitioners.*

## BRIEF IN SUPPORT OF PETITION.

For the statement of the case and the grounds upon which the jurisdiction of this Court is invoked, reference is made to the preceding petition. The Tenth Circuit Court of Appeals erred in affirming the decree of the District Court for the reasons set forth in the preceding petition.

## I.

THE DECISION OF THE SUPREME COURT OF OKLAHOMA AFFIRMING ORDER NO. 3388 OF THE CORPORATION COMMISSION WAS JUDICIAL AND IS RES JUDICATA OF ALL THE ISSUES IN THE INSTANT CASE.

In considering how the Supreme Court of Oklahoma functions, whether legislatively or judicially, upon reviewing orders of the Corporation Commission, the distinction between orders affecting "transportation and transmission companies" and those affecting "public utilities" such as gas companies must be kept clear. Where the order affects a "transportation and transmission company" the Supreme Court of Oklahoma may review the Commission's orders legislatively under the Constitution of Oklahoma. Where the order affects "public utilities," such as "ginners" and "gas companies," which are not included within the Constitutional definition of "transportation and transmission companies," that court only reviews such orders judicially. In a case where the order affected *ginners*, the Oklahoma Supreme Court reviewed carefully the decisions, the Constitutional and statutory provisions of the State pointing out this distinction and decided that it reviews orders affecting public utilities only judicially. *Oklahoma Cotton Ginners' Ass'n. v. State*, 174

Okla. 243. Likewise, in the action to recover excess charges, the Court followed its decision in the *Ginners'* case and held that on the appeal from the Corporation Commission (146 Okla. 272) it had reviewed Order No. 3388 judicially. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 178 Okla. 604.

Independently of that holding, however, a brief reference to the original review of the Commission's Order No. 3388 by the Oklahoma Supreme Court (*Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 146 Okla. 272) will show convincingly that it was judicial.

The Corporation Commission is a tribunal wherein the gas companies could and did present all the evidence touching their rights. When the Commission found that Wilson and Company was being charged a rate in excess of the previously established rate for industrial consumers similarly situated, it fully investigated and declared the liability of the gas company on present or past facts and under the laws then existing. It was merely ordering the gas company to cease its discrimination. *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210.

The only questions raised by the gas companies, in their appeal from that order to the Supreme Court of Oklahoma, were that the order was not supported by the evidence and contrary to the law, and the order violated the Constitution of Oklahoma and the Fourteenth Amendment to the Constitution of the United States. The Supreme Court decided, after a careful study of the evidence and findings of fact by the Commission, that the evidence was sufficient to sustain the findings and to warrant the Commission in making the order. The Supreme Court then held that the order was not contrary to law, and that the gas companies were not denied due process of law. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 146 Okla. 272.



The Supreme Court of Oklahoma was independently determining the right of the parties on the record made before the Commission as finally presented on appeal. The questions called for a purely legal determination. That the court was not making any legislative order such as rates for the future. It merely affirmed an order of the Commission commanding a public utility to render or perform public service such as was its clear legal duty to perform. The questions raised quite clearly show that they were appropriate ones for judicial decision, within the rule announced in the *Ginners' case, supra*, and *Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266.

The gas companies made no effort to have the federal constitutional question reviewed by this court within the time allotted for applying for such a review. That this was the only remedy left open to them was both firmly established and well known to them at the time of the decision in the *Wilson case*. The following cases involved orders of the Corporation Commission affecting gas companies (three involved respondent) which had been reviewed by the Supreme Court of Oklahoma and review was either had or applied for in this Court:

*Oklahoma Natural Gas Co. v. State*, 258 U. S. 234; a review of 78 Okla. 5.

*Oklahoma Natural Gas Co. v. State*, 274 U. S. 721, denying writ of certiorari to review 110 Okla. 297.

*City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U. S. 394; a review of 64 Okla. 214.

*City of Sapulpa v. Oklahoma Natural Gas Co.*, 258 U. S. 608, dismissing writ of error from 79 Okla. 196.

Instead of seeking review in this Court, the gas companies filed this suit in the Federal District Court to en-

join the enforcement of the order as well as the suit in the State court on the ground that the order was invalid for the same Constitutional reasons which they had urged on the appeal to the Supreme Court of Oklahoma. The Supreme Court of Oklahoma had resolved the questions raised in this suit against the gas companies for it both reviewed and affirmed Order No. 3388 and specifically disposed of the constitutional questions. Except for the question raised under the Fourteenth Amendment to the Constitution of the United States the questions raised in the State Court were ones of local law only and the solution of these questions should have been accepted by the Federal Court. As to the Federal question it had been judicially determined adversely to the contentions of the gas companies, and the decision of the Supreme Court of Oklahoma was reviewable only upon application to this Court.

Since the parties and the subject matter in the instant suit are the same as those before the Corporation Commission and the Supreme Court of Oklahoma, the latter court's judgment upon the merits in that proceeding is *res judicata* in this suit as respects all matters actually presented to defeat Order No. 3388 and also as respects any other available matter which might have been presented to that end. *Grubb v. Public Utilities Comm. of Ohio*, 281 U. S. 470.

The Circuit Court of Appeals and the District Court completely disregarded the decision of the Supreme Court of Oklahoma in the *Ginners* case, *supra*, and the two *Wilson* cases, *supra*, and relied upon the earlier opinion of the Tenth Circuit Court of Appeals in *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 54 F. (2d) 596. They refused to consider these cases even though the State Supreme Court in the *Ginners* case, by specific reference to

54 F. (2d) 596, held that the statement in the latter case as to how the Supreme Court of Oklahoma reviewed orders of the Corporation Commission affecting public utilities was not a correct statement of the law of Oklahoma. The *Ginnerys*' case and the second *Wilson* case (178 Okla. 604) were decided after the decision by the Circuit Court of Appeals in 54 F. (2d) 596. They expressed the law of the State of Oklahoma at the time the instant suit was before the District Court and the Circuit Court of Appeals. The federal courts should have followed the Oklahoma Supreme Court's construction of the Constitution and the statutes of the State of Oklahoma, even though the Circuit Court of Appeals had previously held to the contrary. *Messenger v. Anderson*, 225 U. S. 436; *St. Louis & S. F. R. Co. v. Quinette* (Okla. C. C. A. 8th), 251 F. 773.

## II.

THE DISTRICT COURT WAS PROHIBITED BY SECTION 265, JUDICIAL CODE, FROM ENJOINING THE PROSECUTION OF THE ACTION IN THE STATE COURT.

The Tenth Circuit Court of Appeals has affirmed a decree of the District Court of Oklahoma permanently enjoining the *Wilson* companies, their officers, agents, and attorneys from further prosecuting a certain action at law brought by *Wilson & Co., Inc.*, of Oklahoma, a Delaware corporation, against *Oklahoma Gas & Electric Co.*, and its surety, *Fidelity & Casualty Company of New York*. The petition in the State Court (R. 26-35) shows that this was an *in personam* action to recover money damages. The first three counts are for breaches of supersedeas bonds which were filed in the Supreme Court of Oklahoma to supersede Order No. 3388 pending the appeal to that court. The amounts of those bonds cover the excess rate collected

by the Oklahoma Gas & Electric Co. The fourth cause of action is to recover the amounts paid for gas in excess of the lawful rate which is not covered by bonds set up in the three preceding counts.

The suit in the State Court was commenced about six months before the present injunction suit was filed in the Federal District Court. It has been held by the three judge district court in this suit that the action in the State Court, as well as in the Federal Court, were *in personam* actions and that the only thing sought to be accomplished in this equitable action was to enjoin the further prosecution of that action at law in the State Court. (R. 77-78; *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 6 F. Supp. 893.) It will be recalled that the request in this suit for an injunction against state officers was refused.

Section 265 of the Judicial Code prohibits the Federal District Court from enjoining the action at law in the State Court. It provides:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The Tenth Circuit Court of Appeals, however, has held that this section does not apply, for the reason that the injunction is against the parties and not against the State Court, citing *Steelman v. All Continent Co.*, 301 U. S. 278. The *Steelman* case is not applicable for the reason that it involved a proceeding in bankruptcy, which is specifically excepted in Section 265, and further that section was not under consideration.

Under Section 265, as construed by this Court, an injunction against the parties to a proceeding in a state court is the same as a stay of proceedings in that court. *Hill v. Martin*, 296 U. S. 393. Since the action at law in the Okla-



homa Court was not a case within one of the recognized exceptions to Section 265, it was error for the Tenth Circuit Court of Appeals to have affirmed the decree of the District Court enjoining the further prosecution of that action.

### III.

#### VENUE.

The venue objection of petitioner, the Delaware corporation, was made under Section 51, Judicial Code, which provides:

... \* \* no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, \* \* \* .

The company specially appeared and objected to the venue since the sole basis for the suit was under federal law and it was an inhabitant of Delaware. The objection was overruled and exception taken (R. 65) and again preserved in its answer (R. 66).

The only reason for overruling the objection was that the company had previously consented to be sued in Oklahoma county by filing with the Secretary of State an appointment of an agent (R. 187, Ex. 7) which was mandatory under the laws of Oklahoma (See Appendix) before a foreign corporation could do business in that state. The particular clause in the appointment upon which the Circuit Court of Appeals relied is as follows:

"Said company consents that all actions against it may be brought in the county in which the cause of action arose, as now provided by law." (R. 188.)

This clause has no application to this suit in the Federal Court for several reasons. In the first place, the appointment of the agent was filed December 7, 1932 or six months after this suit was filed on May 20, 1932. (R. 35.)

In the second place, the above clause only applies to actions in the state court and to construe the statutes of Oklahoma so as to compel the foreign corporation to surrender a right and privilege secured to it by the Constitution and laws of the United States would render the state law unconstitutional and void. *Southern Pacific Co. v. Denton*, 146 U. S. 202. The ruling of the Circuit Court of Appeals is in direct conflict with the *Denton* case.

Respectfully submitted;

W. R. BROWN,  
PAUL WARE,  
*Counsel for Petitioners.*

## APPENDIX.

Section 43 of Article IX of the Constitution of Oklahoma is as follows:

“No corporation, foreign or domestic, shall be permitted to do business in this State without first filing in the office of the Corporation Commission a list of its stockholders, officers, and directors, with the residence and post office address of, and the amount of stock held by each. And every foreign corporation shall, before being licensed to do business in the State, designate an agent residing in the State; and service of summons or legal notice may be had on such designated agent and such other agents as now are or may hereafter be provided for by law. Suit may be maintained against a foreign corporation in the county where an agent of such corporation may be found, or in the county of the residence of plaintiff, or in the county where the cause of action may arise.” (2 Okl. Stats. 1931, p. 1474, § 13628.)

Section 130, Oklahoma Statutes 1931, provides:

“Every foreign corporation shall, before it shall be authorized or permitted to transact business in this State or continue business therein, if already established, by its certificate under the hand of the president and seal of the company, appoint an agent who shall be a citizen of the State and reside at the state capitol, upon whom service of process may be made in an action in which said corporation shall be a party; and action may be brought in any county in which the cause of action arose, as now provided by law. Service upon said agent shall be taken and held as due service upon said corporation; and such certificate shall also state the principal place of business of such corporation in this State, with the address of the resident agent.” (1 Okl. Stats. 1931, p. 50.)





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CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1939.

**No. 19**

OKLAHOMA PACKING COMPANY, FORMERLY WILSON  
& CO., INC. OF OKLAHOMA, AN OKLAHOMA CORPORA-  
TION, AND WILSON & CO., INC. OF OKLAHOMA, A  
DELAWARE CORPORATION,

*Petitioners,*

*vs.*

OKLAHOMA GAS AND ELECTRIC COMPANY, A COR-  
PORATION; OKLAHOMA NATURAL GAS COMPANY,  
A CORPORATION; W. A. PHILLIPS, JR., H. J. CRAW-  
FORD, J. V. RITTS, LEONARD C. RITTS, R. W.  
HANNAN, A. W. LEONARD, AND R. C. SHARP, THE  
DIRECTORS OF OKLAHOMA NATURAL GAS COMPANY, A  
DISSOLVED CORPORATION; AND OKLAHOMA NATURAL  
GAS CORPORATION,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE TENTH CIRCUIT.

**BRIEF FOR PETITIONERS.**

W. R. BROWN,  
PAUL WARE,

*Counsel for Petitioners.*



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DELAWARE CORPORATION,

*Petitioners,*

*vs.*

OKLAHOMA GAS AND ELECTRIC COMPANY, A CORPORATION;  
OKLAHOMA NATURAL GAS COMPANY, A CORPORATION;  
W. T. PHILLIPS, JR., H. J. CRAWFORD, J. V. RITTS,  
LEONARD C. RITTS, R. W. HANNAN, A. W. LEONARD,  
AND R. C. SHARP, THE DIRECTORS OF OKLAHOMA  
NATURAL GAS COMPANY, A DISSOLVED CORPORATION;  
AND OKLAHOMA NATURAL GAS CORPORATION,

*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE TENTH CIRCUIT.

---

**BRIEF FOR PETITIONERS.**

---

**OPINIONS BELOW.**

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The opinion of the Tenth Circuit Court of Appeals appears in the record (R. 201) and in the reports, 100 F. (2d) 770. The opinion of the District Court appears only in the record (R. 97).

## JURISDICTION.

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The date of the decision and judgment of the Circuit Court of Appeals for the Tenth Circuit is December 19, 1938 (R. 212). Petition for certiorari was filed in this Court March 15, 1939, and was granted April 17, 1939 (R. 213).

The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code as amended by an Act of February 13, 1925.

## STATEMENT.

---

An order of the Oklahoma Corporation Commission, affirmed by the Supreme Court of the State of Oklahoma, directing Oklahoma Natural Gas Company, a public utility, to serve fuel gas to Wilson and Company, an industrial consumer, at its voluntary and previously published rate, has been held invalid by a decree of the United States District Court, which enjoined the enforcement of that order, and also an action at law in the Oklahoma court to recover the overcharges collected subsequent to the date of the Commission's order. This decree was affirmed by the Tenth Circuit Court of Appeals, and is in direct conflict with the law of the State of Oklahoma as previously determined by its Supreme Court, and, in effect, constitutes an assumption of appellate jurisdiction by the Federal district court to review a judgment of the Supreme Court of Oklahoma.

A further matter involved is the objection to the venue of the District Court over petitioner, the Delaware corporation, which promptly appeared specially and objected upon the ground that, in this suit, which is based upon a



federal question, it could not be sued in the district in which it was not an inhabitant (R. 38). The Circuit Court of Appeals affirmed (R. 212, 208) the judgment of the District Court overruling the objection (R. 58, 64, 117).

The controversy between the parties commenced with the complaint of Wilson and Company. (R. 12) against Oklahoma Natural Gas Company and Oklahoma Gas & Electric Company, public utilities, before the Corporation Commission of Oklahoma, wherein Wilson and Company charged that it operated a packing plant outside of the city limits of Oklahoma City and about 450 feet from the pipe line of the general system of Oklahoma Natural; and that because of an agreement between the two utility companies, it was compelled to pay Oklahoma Gas & Electric Company a rate five cents in excess of that charged by Oklahoma Natural to other industries similarly situated. After full hearing of the evidence, the Commission made its findings of fact (R. 16-24), one of which was that the Oklahoma Natural Gas Company, under the circumstances, should be required to supply the Wilson plant with similar quantities of gas to that supplied other institutions located along its pipe line outside of incorporated cities upon the same terms and conditions (R. 24). The Commission, on April 13, 1926, entered its Order No. 3388 requiring that utility company to serve Wilson and Company with fuel gas at its industrial rate (R. 24-25).

That rate was not and is not in dispute since it had been previously and voluntarily adopted by the Oklahoma Natural for industrial users located on its general system outside of the city limits (R. 24, 90, 121-122, 133, 134).

Pending appeal from the Corporation Commission to the Supreme Court of Oklahoma, Order No. 3388 was superseded by respondent filing supersedeas bonds conditioned to refund to the Wilson Company five cents per thousand

cubic feet if the order was affirmed by the Supreme Court of Oklahoma (R. 127-128, Exs. H, I and J; set out in full R. 51-56).

Upon appeal from the Commission's Order No. 3388 to the Supreme Court of Oklahoma, the Oklahoma Natural and the Oklahoma Gas and Electric Companies challenged the validity of that order on the grounds that it was not supported by the evidence, was contrary to law, and a taking of property without due process of law. The Oklahoma Supreme Court, on April 29, 1930, affirmed the order and specifically disposed of each of these contentions. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 146 Okla. 272. The utility companies failed to take an appeal from that decision to the United States Supreme Court.

The same gas companies, on May 20, 1932, filed the present bill (R. 1) in the United States District Court and assailed the validity of Order No. 3388, as affirmed by the Oklahoma Supreme Court, upon the same grounds urged by them in the State Supreme Court (R. 7-8) and sought to enjoin the Wilson companies and state officers from in any way enforcing that order. The utility companies further alleged that the Commission's order and its affirmation by the Supreme Court of Oklahoma were legislative (R. 6, par. VI). The Wilson companies denied these allegations (R. 43, par. 14) and affirmatively answered that the adjudication of the issues before the Corporation Commission and upon appeal to the Supreme Court of Oklahoma was judicial and *res judicata* of all issues in this suit and that the Federal District Court had no jurisdiction to review that judgment (R. 51, pars. 9 and p. R. 64).

The bill further sought to enjoin (R. 8-9) an action at law previously filed on December 3, 1931, in the State Court by Wilson & Co., Inc., against the Oklahoma Gas &

Electric Company and its surety upon said supersedeas bonds to recover the excess charges paid that company for gas (R. 26-35). The Wilson company's further position as to this part of the bill was that, under section 265, Judicial Code, the *in personam* action (R. 77; 6 F. Supp. 893, 895) in the State Court was not within any exceptions to that section and could not be enjoined by a Federal District Court (R. 48-49, par. 22 (d) and (f); R. 116, par. 15; R. 117, 186).

The Circuit Court of Appeals has affirmed (R. 212) the judgment and decree of the District Court which declared invalid, on the grounds alleged, the Commission's Order No. 3388 as affirmed by the Supreme Court of Oklahoma (R. 96), and enjoined the further prosecution of the action in the State Court (R. 109-110). An injunction against state officers was denied.

In holding that Order null and void the Tenth Circuit Court of Appeals (R. 208) and the District Court (R. 96, 104) followed language in a former opinion of that Court of Appeals (*Oklahoma Gas & Electric Company v. Wilson & Co., Inc.*, 54 F. (2d) 596), wherein it stated that the Supreme Court of Oklahoma acted legislatively only, in reviewing orders of the Oklahoma Corporation Commission. The language in that opinion has been expressly held to be an incorrect statement of the law of Oklahoma by the Supreme Court of that State in *Oklahoma Cotton Ginners' Ass'n. v. State*, 174 Okla. 243, at p. 251.

The settled law of Oklahoma as announced in the *Ginners'* case is that decisions of the Supreme Court of Oklahoma on appeals from orders of the Corporation Commission affecting public utilities, other than "transportation and transmission companies," constitute a judicial determination of the questions involved. Upon appeal, from a judgment (R. 135) in favor of Wilson & Co., Inc.,

in said action at law in the State Court, the Supreme Court of Oklahoma followed its decision in the *Ginnery* case, *supra*, and specifically held that its affirmance of Order No. 3388 (in 146 Okla. 272) had been a judicial determination of the validity of that order. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 178 Okla. 604, at p. 605.

The prior suit, the opinion in which is reported in 54 F. (2d) 596, was similar to the present one (R. 183, Ex. 8) and the Tenth Circuit Court of Appeals reversed a decree of the District Court dismissing the bill. Upon remand, a three judge court was convened which held that such a court was without jurisdiction. The bill was thereafter dismissed without prejudice (R. 97) and the present suit filed.

The present case has been before this Court on an appeal from the District Court, three judges sitting, and the only question decided was that a three judge court had no jurisdiction. *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U. S. 386.



## SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred:

1. In refusing to hold that the adjudication of Order No. 3388 by the Corporation Commission and the review and affirmance thereof by the Supreme Court of Oklahoma was, under the laws of Oklahoma, a judicial determination of the validity of the order and *res judicata* of all the issues in the present suit.

2. In refusing to be bound by the decisions of the Supreme Court of Oklahoma, the highest court of that State, construing its Constitution and Laws relating to the character of the functions exercised by that court, in reviewing orders of the Corporation Commission affecting public utilities;

(a) And, incidentally, in following an earlier decision of the Tenth Circuit Court of Appeals (54 F. (2d) 596) which was, at the time the lower courts acted in the present case, in direct conflict with decisions of the Supreme Court of Oklahoma announcing the correct construction of its Constitution and Laws.

3. In granting an injunction, in contravention of section 265, Judicial Code, against the further prosecution of the *in personam* action at law in the State Court to recover the overcharges collected by the Oklahoma Gas & Electric Company from Wilson & Co.

4. In holding that the United States District Court, Western District of Oklahoma, had venue, in this civil suit based on a federal question, over petitioner, a Delaware corporation, qualified to do business in Oklahoma, with a usual place of business in that district, petitioner having appeared specially and objected to being sued in that district on the ground that it was not an inhabitant thereof, which objection has never been waived.

## SUMMARY OF ARGUMENT,

Order No. 3388 of the Corporation Commission of Oklahoma directing the gas company to serve an industrial consumer at its voluntary and previously published rate merely ordered the utility company to cease its discrimination and perform public service which was its clear legal duty so to do.

Upon their appeal from that order to the Supreme Court of Oklahoma, the sole questions raised were that the order was not supported by the evidence and contrary to law and that it was a taking of property without due process of law, which were appropriate ones for judicial decision, and the affirmance thereof was a judicial determination of Order No. 3388. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 146 Okla. 272. In a subsequent decision by that Court it was expressly held that the prior decision was a judicial determination of the order. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 178 Okla. 604.

The decision of the State Supreme Court that it acted judicially on appeals from the Corporation Commission is a construction of state laws and should be followed by the Federal courts. The parties and the issues raised in the above appeal are the same as in the present suit and the judgment of the Supreme Court of Oklahoma is *res judicata* in this suit. *Grubb v. Public Utilities Comm. of Ohio*, 281 U. S. 470.

The injunction staying the prosecution of the action at law in the State Court upon the supersedeas bonds and to recover the excess charges made for gas is prohibited by Section 265, Judicial Code.

A statute of Oklahoma cannot be construed to amend the Federal venue statute (Section 51, Judicial code), and neither can compliance thereunder be construed as a waiver of the privilege of petitioner, the Delaware corporation, to be sued in the Federal courts in the State of Delaware, where it is an inhabitant.

## ARGUMENT.

## I.

THE DECISION OF THE SUPREME COURT OF OKLAHOMA AFFIRMING ORDER NO. 3388 OF THE CORPORATION COMMISSION WAS JUDICIAL AND IS RES JUDICATA OF ALL THE ISSUES IN THE INSTANT CASE.

The parties and the issues in this suit are the same as those in the proceedings heard and determined by the Corporation Commission (R. 16-25) and, also, the same as those before the Supreme Court of Oklahoma in the appeal from Order No. 3388 and decided by it in affirming that order. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 146 Okla. 272. That Court, among other things, held that the order was not contrary to law and was not a taking of property without due process of law.

The gas companies made the same contentions in the case at bar and urged that the Oklahoma Supreme Court acted in a legislative capacity in affirming the order. Wilson and Company contended that the highest court of the State did not act legislatively in this appeal, but functioned in its judicial capacity and its decision was *res judicata* of all the issues in the present suit.

In considering whether the Supreme Court of Oklahoma functions legislatively or judicially in reviewing orders of the Corporation Commission, the distinction between orders affecting "transportation and transmission companies" and those affecting "public utilities", such as gas companies, must be kept clear.

Where the order affects a "transportation and transmission company" the Supreme Court of Oklahoma, un-



der the State Constitution, may review the Commission's orders legislatively in that it may enter the order which the Commission should have entered.

Where the order affects "*public utilities*," such as "ginners" and "gas companies," (which are not included within the constitutional definition of "transportation and transmission companies"), that Court reviews such orders judicially only and may not enter an order which the Commission should have entered.<sup>1</sup>

This distinction was clearly pointed out by the Supreme Court of Oklahoma in reviewing an order of the Corporation Commission affecting ginners. That Court reviewed carefully the decisions, the constitutional and statutory provisions of the State, and held that it reviews orders affecting public utilities, other than "transportation and transmission companies," judicially only. *Oklahoma Cotton Ginners' Assn. v. State*, 174 Okla. 243.

The reasoning and the rule announced in the *Ginners'* case was followed by that Court in the appeal in the law action on the supersedeas bonds and it was held that it had previously reviewed Order No. 3388 (146 Okla. 272) judicially. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 178 Okla. 604 at p. 605.

The above decisions were completely disregarded by the Circuit Court of Appeals and the District Court. They relied upon the opinion of the Tenth Circuit Court of Appeals in *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 54 F. (2d) 596, even though the State Supreme Court in the *Ginners'* case, 174 Okla. at page 251, had<sup>2</sup> specifically held that the statement as to how the Su-

1. Jurisdiction of the Corporation Commission over "gas companies" was conferred by the legislature in Chap. 93, Sess. Laws of Okla. 1913, sections 1-5 (Okla. Stats. 1931, Secs. 3617-3621) and not by Article IX of the Oklahoma Constitution. *Oklahoma Natural Gas Co. v. State*, 78 Okla. 5 at p. 7.

preme Court of Oklahoma reviewed orders of the Corporation Commission affecting public utilities, appearing in 54 F. (2d) 596, was not a correct statement of the law of Oklahoma.

The decisions in the *Gimmers'* case and the second *Wilson* case (178 Okla. 604) were subsequent to the decision by the Tenth Circuit Court of Appeals in 54 F. (2d) 596. They expressed the law of the State of Oklahoma at the time the case at bar was before the District Court and the Circuit Court of Appeals. The federal courts should have followed the construction given the Constitution and statutes of the State of Oklahoma by the Supreme Court of that State, even though the Circuit Court of Appeals had previously held to the contrary. *Messenger v. Anderson*, 225 U. S. 436; *St. Louis & S. F. R. Co. v. Quinette* (Okla. C. C. A. 8th), 251 Fed. 773.

When the Supreme Court of Oklahoma affirmed Order No. 3388 it judicially determined the validity of that order. (*Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 146 Okla. 272.) A brief reference to the original proceedings before the Corporation Commission and the review of its order by the Supreme Court of Oklahoma will show convincingly that it was judicial.

The Corporation Commission is a tribunal wherein the gas companies could and did present all the evidence touching their rights. When the Commission found *Wilson & Company* was being charged a rate in excess of the previously established rate for industrial consumers similarly situated, it fully investigated and declared the liability of the gas company on present or past facts and under the laws then existing. No new rate was established for the future. *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, at p. 226. It merely ordered the gas company to cease its discrimination. *Oklahoma Gas & Elec-*

*tric Co. v. Wilson & Co., Inc.*, 146 Okla. 272, at pp. 281, 282-283.

The only questions raised by the gas companies, in their appeal from that order to the Supreme Court of Oklahoma, were that the order was not supported by the evidence and contrary to the law, and the order violated the Constitution of Oklahoma and the Fourteenth Amendment to the Constitution of the United States. The State Supreme Court decided, after a careful study of the evidence and findings of fact by the Commission, that the evidence was sufficient to sustain the findings and to warrant the Commission in making the order. The Supreme Court then held that the order was not contrary to law, and that the gas companies were not denied due process of law. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 146 Okla. 272.

The Supreme Court of Oklahoma was reviewing the record made before the Commission as finally presented on appeal. The questions called for a purely legal determination. That Court was not making any legislative finding or order, such as rates for the future. It merely reviewed and affirmed an order of the Commission commanding a public utility to render or perform public service such as was its clearly legal duty to perform. The questions raised clearly show that they were appropriate ones for judicial decision within the rule announced in the *Ginners* case, 174 Okla. at pp. 251-252, and *Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, at pp. 275-277.

The District Court of the United States was without power or authority to thus review and reverse the decision of the Supreme Court of Oklahoma. This Honorable Court is the only tribunal that would have had such jurisdiction, and then only upon application made directly from

the State Supreme Court. This has long been the understood and well established procedure in such cases.<sup>1</sup>

The judgment of the Supreme Court of Oklahoma upon the merits in that proceeding is *res judicata* of all issues raised in the case at bar. *Grubb v. Public Utilities Comm. of Ohio*, 281 U.S. 470.

## II.

THE DISTRICT COURT WAS PROHIBITED BY SECTION 265, JUDICIAL CODE, FROM ENJOINING THE PROSECUTION OF THE ACTION IN THE STATE COURT.

The Tenth Circuit Court of Appeals has affirmed a decree of the District Court of Oklahoma permanently enjoining the Wilson companies, their officers, agents, and attorneys from further prosecuting a certain action at law brought by Wilson & Co., Inc., of Oklahoma, a Delaware corporation, against Oklahoma Gas & Electric Co., and its surety, Fidelity & Casualty Company of New York.

The petition in the State Court (R. 26-35) shows that this was an *in personam* action to recover money damages. The first three counts are for breaches of supersedeas bonds which were filed in the Supreme Court of Oklahoma to supersede Order No. 3388 pending the appeal

1. The following cases involved orders of the Corporation Commission affecting gas companies which had been reviewed by the Supreme Court of Oklahoma and review was either had or applied for in this Court:

*Oklahoma Natural Gas Co. v. State*, 258 U. S. 234; a review of 78 Okla. 5.

*Oklahoma Natural Gas Co. v. State*, 274 U. S. 721; denying writ of certiorari to review 110 Okla. 297.

*City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U. S. 394; a review of 64 Okla. 214.

*City of Sapulpa v. Oklahoma Natural Gas Co.*, 258 U. S. 608, dismissing writ of error from 79 Okla. 196.



to that court. The amounts of those bonds cover the excess rate collected by the Oklahoma Gas & Electric Co. subsequent to the date of the Commission's order. The fourth cause of action is to recover the amounts paid for gas in excess of the lawful rate which is not covered by bonds set up in the three preceding counts.

The suit in the State Court was commenced about six months before the present injunction suit was filed in the Federal District Court. It has been held by the three judge district court in this suit that the action in the State Court, as well as in the Federal Court, were *in personam* actions and that the only thing sought to be accomplished in this equitable action was to enjoin the further prosecution of that action at law in the State Court. (R. 77; *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 6 F. Supp. 893.) It will be recalled that the request in this suit for an injunction against state officers was refused.

Section 265 of the Judicial Code prohibits the Federal District Court from enjoining the action at law in the State Court. It provides:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This Court has applied that section to similar situations repeatedly from the time of its enactment to the current decision in *Kohn v. Central Distributing Co.*, 306 U. S. 531.

The Tenth Circuit Court of Appeals, however, has held that this section does not apply, for the reason that the injunction is against the parties and not against the State Court, citing *Steelman v. All Continent Co.*, 301 U. S. 278. The *Steelman* case is not applicable for the reason that it involved a proceeding in bankruptcy, which is specifically

excepted in Section 265, and further that section was not under consideration.

Under Section 265, as construed by this Court, an injunction against the parties to a proceeding in a state court is the same as a stay of proceedings in that court. *Hill v. Martin*, 296 U. S. 393. Since the action at law in the Oklahoma Court was not a case within one of the recognized exceptions to Section 265, it was error for the Tenth Circuit Court of Appeals to have affirmed the decree of the District Court enjoining the further prosecution of that action.

### III.

#### VENUE.

The venue objection of petitioner, the Delaware corporation, was made under Section 51, Judicial Code, which provides:

“ . . . no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.”

Since jurisdiction of the present suit is founded on a federal question, the first part of the statute applies. It is settled, however, that the reasoning in cases based on the latter part of the statute, which deals with diversity of citizenship, is equally applicable to suits arising under the Constitution, laws, or treaties of the United States; the only difference being that, where suit is founded on a federal question, it must be brought in the district of which the defendant is an inhabitant. *In re Keasbey & Mattison Co.*, 160 U. S. 221.

The company appeared specially and objected to the venue on the ground that it was an inhabitant of Delaware. The objection was overruled and exception taken and again preserved in its answer (R. 64).

The only reason given for overruling the objection was that the company had previously consented to be sued in Oklahoma county by filing with the Secretary of State an appointment of an agent (R. 182, Ex. 7) which was mandatory under the laws of Oklahoma (See Appendix) before a foreign corporation could do business in that state. The particular clause in the appointment upon which the Circuit Court of Appeals relied is as follows:

"Said company consents that all actions against it may be brought in the county in which the cause of action arose, as now provided by law." (R. 182.)

This clause has no application to this suit in the Federal Court for several reasons.

In the first place, the above clause applies only to actions in the State Court. To construe the statutes of Oklahoma so as to compel the foreign corporation to surrender a right and privilege secured to it by the Constitution and laws of the United States would render the state law unconstitutional and void. The ruling of the Tenth Circuit Court of Appeals is in direct conflict with the decision of this Court in *Southern Pacific Co. v. Denton*, 146 U. S. 202.

In the second place, the appointment of the agent was filed December 12, 1932 (R. 183), or six months after this suit was filed on May 20, 1932 (R. 1).

Since certiorari was granted in the present case the Second Circuit Court of Appeals refused to follow the decision of the Tenth Circuit Court of Appeals in this case and was not convinced of the soundness of the distinction attempted to be made as a result of the clause in the above

appointment of an agent. *Neirbo Company et al. v. Bethlehem Shipbuilding Corporation, Ltd.*, 103 F. (2d) 765.<sup>1</sup> That decision and one by the Fifth Circuit Court of Appeals in *McLean v. State of Mississippi*, 96 F. (2d) 741, certiorari denied 305 U. S. 623, contain a careful analysis of the authorities and consider and dispose of the various objections offered against the ruling in the *Denton* case.

Under the existing law it was error for the Tenth Circuit Court of Appeals to affirm a decree of the District Court denying the petitioner, a Delaware corporation, its privilege not to be sued in the Western District of Oklahoma.

Respectfully submitted,

W. R. BROWN,

PAUL WARE,

*Counsel for Petitioners.*



## APPENDIX.

Section 43 of Article IX of the Constitution of Oklahoma is as follows:

"No corporation, foreign or domestic, shall be permitted to do business in this State without first filing in the office of the Corporation Commission a list of its stockholders, officers, and directors, with the residence and post office address of, and the amount of stock held by each. And every foreign corporation shall, before being licensed to do business in the State, designate an agent residing in the State; and service of summons or legal notice may be had on such designated agent and such other agents as now are or may hereafter be provided for by law. Suit may be maintained against a foreign corporation in the county where an agent of such corporation may be found, or in the county of the residence of plaintiff, or in the county where the cause of action may arise." (2 Okl. Stats. 1931, p. 1474, § 13628.)

Section 130, Oklahoma Statutes 1931, provides:

"Every foreign corporation shall, before it shall be authorized or permitted to transact business in this State or continue business therein, if already established, by its certificate under the hand of the president and seal of the company, appoint an agent who shall be a citizen of the State and reside at the state capitol, upon whom service of process may be made in an action in which said corporation shall be a party; and action may be brought in any county in which the cause of action arose, as now provided by law. Service upon said agent shall be taken and held as due service upon said corporation; and such certificate shall also state the principal place of business of such corporation in this State, with the address of the resident agent." (1 Okl. Stats. 1931, p. 50.)



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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1939.

**No. 19**

OKLAHOMA PACKING COMPANY, FORMERLY WILSON & CO., INC., OF OKLAHOMA, AN OKLAHOMA CORPORATION, AND WILSON & CO., INC. OF OKLAHOMA, A DELAWARE CORPORATION,

*Petitioners,*

vs.

OKLAHOMA GAS AND ELECTRIC COMPANY, A CORPORATION; OKLAHOMA NATURAL GAS COMPANY, A CORPORATION; W. T. PHILLIPS, H. J. CRAWFORD, J. V. RITTS, LEONARD C. RITTS, R. W. HANNAN, A. W. LEONARD AND R. C. SHARP, THE DIRECTORS OF OKLAHOMA NATURAL GAS COMPANY A DISSOLVED CORPORATION; AND OKLAHOMA NATURAL GAS CORPORATION,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

**REPLY BRIEF FOR PETITIONERS.**

✓ W. R. BROWN,  
PAUL WARE,

*Counsel for Petitioners.*





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IN THE  
**Supreme Court of the United States,**

OCTOBER TERM, 1939.

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**No. 19.**

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*Petitioners,*

*vs.*

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*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

---

**REPLY BRIEF FOR PETITIONERS.**

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In order to clarify the issues, overcome certain inferences and dispose of certain decisions, this reply brief is filed.

## REPLY TO RESPONDENTS' STATEMENT.

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Respondents' statements on page 3 of their Brief that the opinion in *Oklahoma Gas & Electric Co., et al. v. Wilson & Co., Inc. of Oklahoma, et al.*, 54 F. (2d) 596 "became final" and "this suit in the United States District Court was dismissed \* \* \* and refiled" is confusing. The Tenth Circuit Court of Appeals reversed the decree of a single district judge dismissing the respondents' bill of complaint and remanded the cause to that Court with directions to proceed to a final disposition of the cause consistent with its opinion. (54 F. (2d) 596, 599.) The cause was remanded and the respondents filed an amended and supplemental bill adding Wilson & Co., Inc. of Oklahoma, a Delaware corporation, as a party defendant, and further sought to enjoin the action upon the supersedeas bonds in the State Court. The respondents dismissed that suit without prejudice and thereafter commenced a new suit which is the one now before this Court (R. 59-60, 183).

To further clarify the last paragraph on page 4 of respondents' brief, it should be pointed out that the decision of the Supreme Court of Oklahoma in *Oklahoma Gas & Electric Co. v. Wilson & Co.*, 178 Okla. 604, was rendered September 15, 1936, and a rehearing denied January 5, 1937. The decree of the United States District Court in the case at bar was dated and filed September 10, 1937 (R. 109-110).

### Reply to Respondents' Point I.

Respondents undertake to avoid the rule that the Federal Court should have applied the law of Oklahoma as declared by its highest court, by the suggestion that they



"could not anticipate in 1930 that the Supreme Court of the State, in 1935, would change its position in regard to the capacity in which it reviewed a certain class of orders appealed from the Corporation Commission" (Page 6, Respondents' brief).

This suggestion is without merit. When the United District Court entered its decree herein on September 10, 1937 (R. 109) and when it was affirmed by the Circuit Court of Appeals on December 19, 1938 (R. 212), the law of Oklahoma, as construed by the State Supreme Court that it functioned judicially in such cases, was well settled by *Oklahoma Cotton Ginners' Ass'n. v. State*, 174 Okla. 243, decided October 17, 1935, and *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 178 Okla. 604, decided September 15, 1936.

The cases cited in the footnote to page 14 of petitioners' brief indicate that, long prior to 1930, it was understood that the Supreme Court of Oklahoma functioned judicially in cases affecting gas companies. See also *Pierce Oil Corp., et al. v. Phoenix Refining Co.*, 259 U. S. 125, affirming 79 Okla. 36; and *Okmulgee Gas Co. v. Corporation Commission*, 95 Okla. 213.

While it is true that some confusion existed between 1932 and 1935 as to whether the Supreme Court of Oklahoma functioned legislatively or judicially in its review of orders of the Corporation Commission affecting gas companies, the principal cause of this confusion was occasioned by the Tenth Circuit Court of Appeals in *Oklahoma Gas & Electric Co., et al. v. Wilson & Co., Inc. of Oklahoma, et al.*, 54 F. (2d) 596, decided December 21, 1931.

In *McAlester Gas & Coke Co. v. Corporation Commission, et al.*, 101 Okla. 628 (page 5, Respondents' brief), the only question decided was whether supersedeas should be granted pending an appeal.

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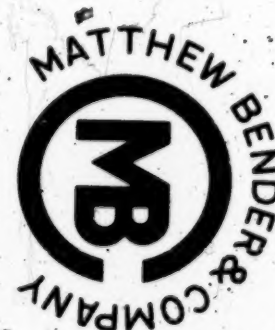
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In *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, it was admitted that the Supreme Court of Oklahoma acted in a legislative capacity. Obviously, as indicated in the *Ginners* case, *supra*, page 251, this Court assumed, without deciding, that the appeal was analogous to appeals in transportation and transmission company rate cases.

In *City of Poteau v. American Indian Oil & Gas Co.* (1932), 159 Okla. 240, the Oklahoma Supreme Court followed the decision in 54 F. (2d) 596, and the confusion in the Oklahoma courts began. The Oklahoma Supreme Court in the *Ginners* case, *supra*, page 251, in addition to calling attention to the Circuit Court's erroneous conclusion in 54 F. (2d) 596, points out that the parties stipulated that that Court might fix a rate and the question of authority of that Court was not presented.

The case of *Corporation Commission of Oklahoma, et al. v. Cary*, 296 U. S. 452, was commenced and decided by the District Court during this period of confusion in the Oklahoma decisions, and the District Court followed the *City of Poteau* case, *supra*, which was the last pronouncement of the Supreme Court of the State of Oklahoma. This Court points this out in 296 U. S. 452, at page 458, and says that under these circumstances it is not necessary to analyze the decision in the *Ginners* case decided subsequent to the decision of the *Cary* case by the District Court.

When the case at bar was decided by the District Court and affirmed by the Tenth Circuit Court of Appeals, this confusion had been cleared up by the *Ginners* case, and the *Wilson* case, *supra*, and the District Court was without authority to review and reverse the judicial findings of the Oklahoma Supreme Court.

### **Reply to Respondents' Point II.**

In *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239, cited on page 8 of Respondents' brief, an injunction was issued to stay a proceeding in a state court which had been duly removed to the federal court.

The question in *Steelman v. All Continent Corporation*, 301 U. S. 278, was the power of a court of bankruptcy to enjoin prosecution of a suit in another federal court.

### **Reply to Respondents Point III.**

The errors relied upon in support of petitioner's objection to the venue have been adequately and properly assigned on appeal to the Tenth Circuit Court of Appeals (R. 186, No. 2; R. 189, No. 10); and in this Court (Petition for Certiorari, page 6).

Petitioner not only promptly objected to the venue of the District Court and preserved this objection in its answer (R. 64), but also requested an additional finding of fact (R. 113, Par. 6) and a conclusion of law (R. 115, Par. 10) on this point at the close of the hearing, which were denied and exceptions allowed (R. 117).

We respectfully submit that petitioner's objection to the venue was properly preserved and the case of *Southern Pacific Co. v. Denton*, 146 U. S. 202, is controlling.

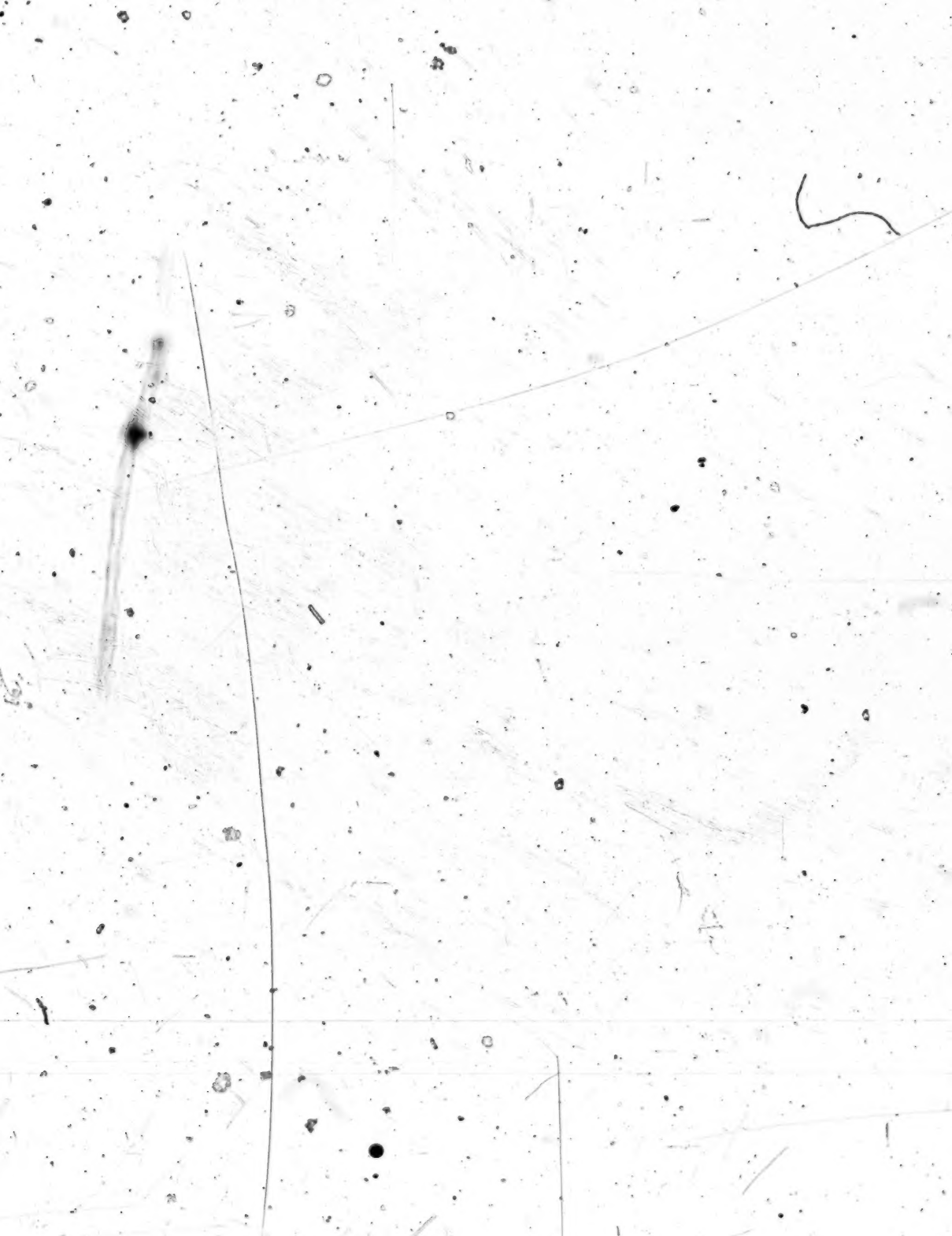
Respectfully submitted,

W. R. BROWN,

PAUL WARE,

*Counsel for Petitioners.*





NO. 750

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**In the Supreme Court of  
the United States**

October Term, 1938

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OKLAHOMA PACKING COMPANY, formerly WILSON &  
Co., INC. OF OKLAHOMA, an Oklahoma Corporation,  
and WILSON & Co., INC. OF OKLAHOMA, a Delaware  
Corporation,

*Petitioners,*

VERSUS

OKLAHOMA GAS and ELECTRIC COMPANY, a Corpora-  
tion; OKLAHOMA NATURAL GAS COMPANY, a Corpo-  
ration; W. T. PHILLIPS, JR., H. J. CRAWFORD, J. V.  
RITTS, LEONARD C. RITTS, R. W. HANNAN, A. W.  
LEONARD, and R. C. SHARP, the Directors of the Okla-  
homa Natural Gas Company, a Dissolved Corpora-  
tion; and OKLAHOMA NATURAL GAS CORPORATION,

*Respondents.*

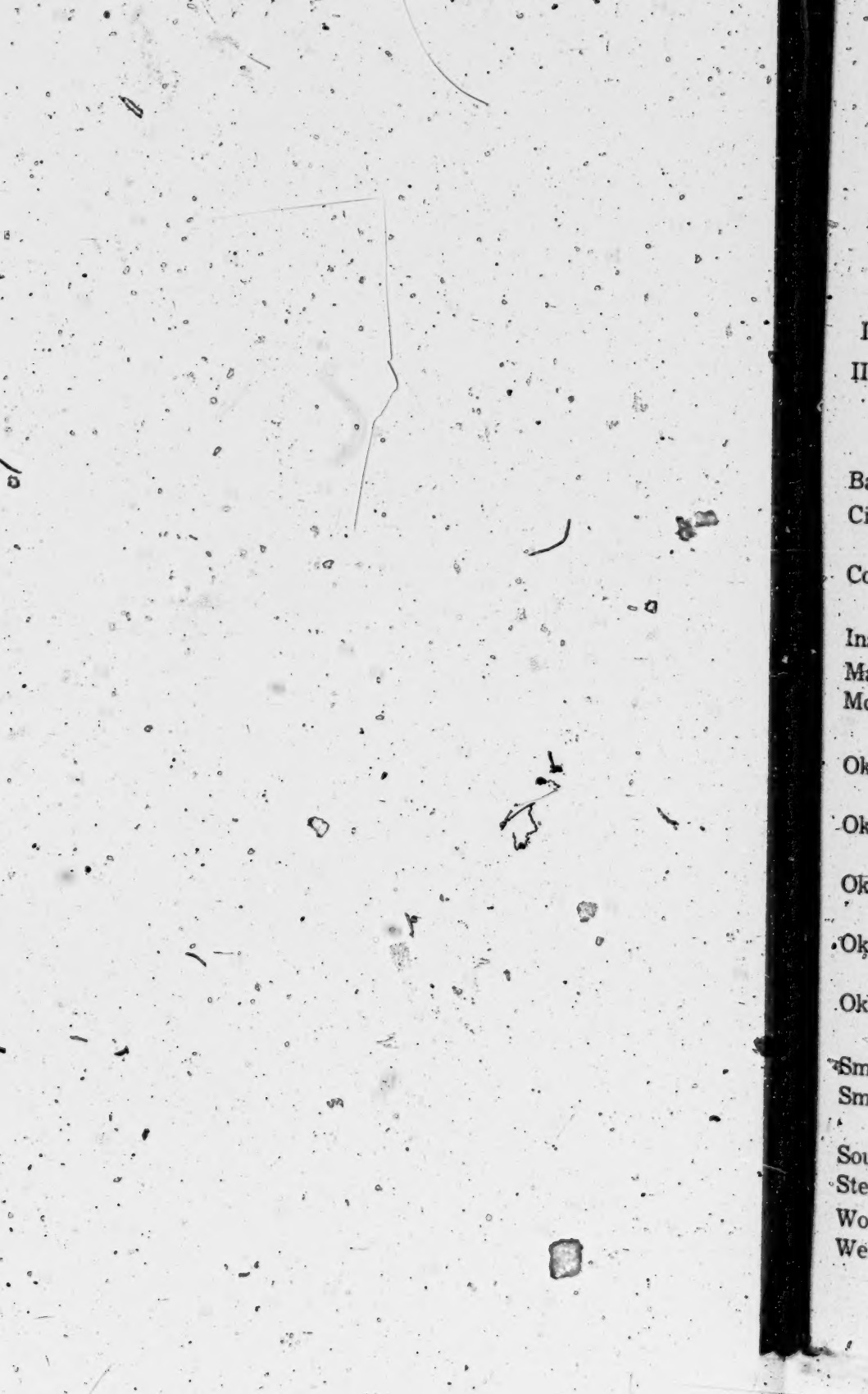
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**RESPONSE TO BRIEF IN SUPPORT OF PETITION  
FOR WRIT OF CERTIORARI**

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In the Supreme Court of the United States

October Term, 1938

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*Petitioners,*

VERSUS

OKLAHOMA GAS and ELECTRIC COMPANY, a Corporation; OKLAHOMA NATURAL GAS COMPANY, a Corporation; W. T. PHILLIPS, JR., H. J. CRAWFORD, J. V. RITTS, LEONARD C. RITTS, R. W. HANNAN, A. W. LEONARD, and R. C. SHARP, the Directors of the Oklahoma Natural Gas Company, a Dissolved Corporation; and OKLAHOMA NATURAL GAS CORPORATION,

*Respondents.*

**RESPONSE TO BRIEF IN SUPPORT OF PETITION  
FOR WRIT OF CERTIORARI**

The facts are fully set forth in the opinion of the Circuit Court of Appeals. Petitioners predicate their appeal for the writ on three grounds, none of which involves the merits of the case. We will respond to grounds urged in the order in which they appear in petitioners' brief.

I.

**REPLY TO PETITIONERS' FIRST PROPOSITION**

(Petitioners' Brief pp. 9-13.)

The order of the Corporation Commission complained of was entered on the 13th of April, 1926 (R. 16). An ap-

peal was prosecuted to the Supreme Court of the State, which affirmed the order of the Commission on the 29th day of April, 1930 (*Oklahoma Gas and Electric Co. v. Wilson & Co., Inc.*, 146 Okla. 272, 288 Pac. 316). It is contended by petitioners that the action of the Supreme Court in affirming the Commission's order was judicial and not legislative, and that if respondents were dissatisfied with the action of the Supreme Court of the State they should have prosecuted an appeal to this Court rather than filing a suit in equity in the United States District Court for the Western District of Oklahoma. In that suit the United States District Court sustained a motion to dismiss and respondents prosecuted an appeal to the Circuit Court of Appeals, which reversed the District Court (*Oklahoma Gas and Electric Co. v. Wilson & Co., Inc.*, 54 Fed. (2d) 596).

Petitioners urge that, since the Supreme Court of the State on October 17, 1935, in the case of *Oklahoma Cotton Ginners' Ass'n et al. v. State et al.*, 174 Okla. 243, 51 Pac. (2d) 327, held that it there acted judicially as distinguished from legislatively in reviewing appeals from a certain class of orders of the Corporation Commission, this Court should hold that the Supreme Court of the State acted judicially when it passed upon the appeal from the challenged order of the Corporation Commission in April, 1930. (146 Okla. 272, 288 Pac. 316.)

The Supreme Court of Oklahoma, until the decision in the Cotton Ginners' Ass'n case *supra*, had always considered all appeals from the Corporation Commission in a legislative

capacity. In the case of *McAlester Gas & Coke Co. v. Corporation Commission*, 101 Okla. 268, 224 Pac. 698, it specifically marked out and approved the very procedure followed in this case to obtain a judicial review of the challenged order. In the case of *City of Poteau v. American Indian Oil & Gas Co.*, 159 Okla. 240, 18 Pac. (2d) 523, the Supreme Court of the State cites with approval the case of *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 54 Fed. (2d) 596, and states that the court therein held that the action of the Supreme Court of the State in *Oklahoma Gas & Electric Co. v. Wilson & Co.*, 146 Okla. 272, 288 Pac. 316, was legislative and not judicial.

The Supreme Court of the State, in *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 178 Okla. 604, 63 Pac. (2d) 703, in staying an action instituted by petitioner in the District Court in and for Oklahoma County, pending the disposition of this case, specifically held that respondents, by their suit in equity, were pursuing the only certain method of obtaining a judicial determination of the validity of the order here under attack. It would not, we suggest, have stayed further proceedings had it been of the opinion that its review of the order challenged herein was judicial and not legislative. The fact that the Supreme Court of the State, in the Cotton Ginners' case several years after the time to appeal to this Court had expired, receded from its prior rulings, cannot affect this case. The situation is very similar to that before this Court in the case of *Corporation Commission of Oklahoma et al. v. Carey, Trustee*, 296 U. S. 452.

## II.

## REPLY TO PETITIONERS' SECOND PROPOSITION

(Petitioners' Brief pp. 13-15.)

Petitioners fail to see any distinction between enjoining proceedings in the State Court and enjoining the parties in an action in a State Court, and emphasize the fact that the case of *Steelman v. All Continent Co.*, 301 U. S. 278, is a bankruptcy case. The cases cited therein are not bankruptcy cases, and several deal with Sec. 265 of the Judicial Code. In *Smith v. Apple*, 264 U. S. 274, one of the cases cited, it was specifically held that Section 265 does not deprive a district court of jurisdiction otherwise conferred by the Federal Statutes, but merely goes to the question of equity in the particular bill. See also *Woodmen of the World v. O'Neill*, 266 U. S. 292. Petitioners do not at this time question the equity of respondents' bill, and it conclusively appears under the decisions of both the state and federal courts that the action instituted by petitioners in the District Court of Oklahoma County would only have the effect of harassing respondents and uselessly causing them expense and annoyance since the District Court of Oklahoma County cannot render a judgment against them prior to the determination of the equity suit. *Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 178 Okla. 604, 63 Pac. (2d) 703-705. This case in principle is the same as that of *Marshall v. Holmes*, 141 U. S. 589, and *Wells Fargo & Co. v. Taylor*, 254 U. S. 175, wherein it was held that a Federal Court of Equity could enjoin the enforcement of judgments wrongfully obtained in a state court.

## BRIEF OF RESPONDENTS

### III.

#### REPLY TO PETITIONERS' THIRD PROPOSITION

(Petitioners' Brief pp. 15-16.)

The question of venue is so fully discussed in the Circuit Court of Appeals' opinion that there is little we might attempt to add: Petitioners were doing business in the state long prior to the filing of this suit (R. 41), and will be held to have consented to be sued in Oklahoma or will be estopped to urge that such consent was not given. *Smolik v. Philadelphia & Redding Coal & Iron Co.*, 222 Fed. 148. The return of the marshal, which was never subject to attack, shows that process was served on W. W. Martin, service agent for said corporation (R. 37). In addition, the lower court which entered findings of fact (para. 10, R. 96) found petitioners were doing business in Oklahoma prior to the institution of this suit, and that, as provided by the statutes of the state, it "duly executed in writing and filed with the proper officers of the State of Oklahoma an appointment of an agent upon whom service of process might be had in any action in the State of Oklahoma to which said company may be a party, and consenting that such service would be due and legal service on the company and that all actions against it might be brought in the county in which the cause of action arose." As the Circuit Court of Appeals points out, this finding of fact was never excepted to or otherwise challenged below.

The only case cited by petitioners is that of *Southern Pacific Co. v. Denton*, 146 U. S. 202. It will be observed in that case that the plaintiff relied on two statutes of Texas to



hold the defendant in court. Both statutes are discussed in the opinion. This Court first took up the statute dealing with the entrance requirements for a foreign corporation desiring to transact business in the state. One of those requirements was that process could be served on certain agents. Another was that the corporation would not remove cases to the federal court. This Court held that the statute requiring the corporation to surrender the right of removal secured by the laws of the United States was void, citing *Insurance Co. v. Morse*, 20 Wallace 445, and *Barron v. Burnside*, 121 U. S. 186. Both of those cases dealt with statutes providing that foreign corporations, as a condition of entrance, should agree not to remove cases to the federal court. It is clear in the Denton case that the right which Texas required to be surrendered and which rendered the entire statute void, was the *right of removal*. The reason given why a state could not require a foreign corporation to forego the right to remove cases to the federal courts was that parties by agreement cannot deprive a court of jurisdiction and, under the Constitution and laws of the United States the federal courts, have jurisdiction where diversity of citizenship of the parties exists.

The case of *Barron v. Burnside*, 121 U. S. 186, based upon the case of *Insurance Co. v. Morse*, 20 Wallace 445, does much to explain the holding in the Denton case. The Iowa statute involved in the Barron case was very similar to the Texas statute in the Denton case, in that it provided for service of process on an agent, and required an agreement against removal. This court struck down the entire

statute, just as it did in the Denton case, holding that the service provision and the provision against removals were not separable. As to the service provision, if standing alone, this Court said:

"An affirmative provision requiring the filing \* \* \* with the Secretary of State \* \* \* of an authority for the service of process upon a designated officer or agent in the state might not be an unreasonable or objectionable requirement if standing alone \* \* \*"

This Court in the Denton case, just as it did in the case of *Barron v. Burnside*, after holding the entire statute void, discusses the section dealing with the service of process just as if it had stood alone, and holds that prior to the amendment of the venue statute the mere appointment of an agent for the service of process was a consent to be found within the state, but that after the amendment such an appointment of an agent alone was not broad enough to constitute a waiver of venue. The Oklahoma constitutional and statutory entrance requirements are much broader than the statutes providing for the appointment of an agent for service. They are set out in the opinion of the Circuit Court of Appeals and exact not merely a consent to be served but a consent to be sued.

This Court in the Denton case next considered the Texas practice statute, which provided that a special appearance should constitute a general appearance. There can be no confusion in regard to the holding of this Court if it is kept in mind in considering the latter portion of the opinion that the court was discussing the practice

statute of the state and not the entrance requirement statute.

It is respectfully submitted that the prayed for writ should be denied.

I. J. UNDERWOOD,  
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# In the Supreme Court of the United States

October Term, 1939

OKLAHOMA PACKING COMPANY, Formerly Wilson &  
Co., Inc., of Oklahoma, an Oklahoma Corporation,  
and WILSON & Co., INC., OF OKLAHOMA, a Delaware  
Corporation,

*Petitioners.*

VERSUS

OKLAHOMA GAS & ELECTRIC COMPANY, a Corporation;  
OKLAHOMA NATURAL GAS COMPANY, a Corporation;  
W. T. PHILLIPS, JR., H. J. CRAWFORD, J. V. RITTS,  
LEONARD C. RITTS, R. W. HANNAN, A. W. LEONARD,  
and R. C. SHARP, the Directors of Oklahoma Natural  
Gas Company, a Dissolved Corporation; and OKLA-  
HOMA NATURAL GAS CORPORATION,

*Respondents.*

On Writ of Certiorari to the United States Circuit Court  
of Appeals for the Tenth Circuit

## BRIEF FOR RESPONDENTS

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In the Supreme Court of the United States

October Term, 1939

OKLAHOMA PACKING COMPANY, Formerly Wilson & Co., Inc., of Oklahoma, an Oklahoma Corporation, and WILSON & Co., INC., OF OKLAHOMA, a Delaware Corporation,

*Petitioners,*

VERSUS

OKLAHOMA GAS & ELECTRIC COMPANY, a Corporation; OKLAHOMA NATURAL GAS COMPANY, a Corporation; W. T. PHILLIPS, JR., H. J. CRAWFORD, J. V. RITTS, LEONARD C. RITTS, R. W. HANNAN, A. W. LEONARD, and R. C. SHARP, the Directors of Oklahoma Natural Gas Company, a Dissolved Corporation; and OKLAHOMA NATURAL GAS CORPORATION,

*Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

**BRIEF FOR RESPONDENTS**

**STATEMENT**

On the 15th of November, 1925, Wilson & Company, Inc., of Oklahoma, an Oklahoma corporation, with a meat packing plant outside the city limits of Oklahoma City, filed a complaint against Oklahoma Gas & Electric Company and Oklahoma Natural Gas Company with the Corporation Commission of the State of Oklahoma, asking that the Oklahoma Natural Gas Company be compelled to furnish it

with gas service, and that \* \* \* the Commission make such order with reference to the price of gas to be charged this plaintiff, the connection and meters to be installed, the supply lines to be laid, and the costs thereof \* \* \* (T. 15). At all times prior to the filing of the Complaint, such gas service as Wilson & Company, Inc., of Oklahoma (Oklahoma) had availed itself of had been furnished by the Oklahoma Gas and Electric Company, the holder of a gas franchise in Oklahoma City, and the operator of a gas distribution system in Oklahoma City and its environs.

The Corporation Commission on the 13th day of April, 1926 (T. 16-25), filed its findings, opinion and order, directing that the Oklahoma Natural Gas Company furnish service to Wilson & Company, Inc., at the rates prescribed therein. An appeal was prosecuted to the Supreme Court of the State, which affirmed the Corporation Commission's order (*Oklahoma Gas & Electric Company v. Wilson & Company, Inc.*, 146 Okla. 272). Suit was then filed in the United States District Court for the Western District of Oklahoma by respondents herein against Wilson & Company, Inc., an Oklahoma corporation, and the Corporation Commission, in which the validity of the order was assailed on federal grounds and an injunction sought.

The District Court sustained a motion to dismiss on the ground that the affirmance of the order by the Supreme Court of the State was judicial in character, as distinguished from legislative. An appeal was prosecuted to the Circuit Court of Appeals for the Tenth Circuit, which reversed the District Court, stating:

"It is also clear from the State Constitution that in

affirming the order the Supreme Court acted only in the exercise of a legislative function." (*Oklahoma Gas and Electric Co. et al. v. Wilson & Company, Inc., of Okla. et al.*, 54 Fed. (2d) 596.)

The opinion in the above case was filed on December 21, 1931, and became final. On the 3rd of December, 1931 (T. 26), Wilson & Company, Inc., of Oklahoma (Oklahoma) transferred its meat packing plant at Oklahoma City, together with all choses in action and claims, including the one in controversy herein, to Wilson & Company, Inc., of Oklahoma, a Delaware corporation, which immediately thereafter filed an action in the state District Court of Oklahoma County, Oklahoma, to recover an amount of money collected by the Oklahoma Gas and Electric Company from Wilson & Company, Inc., in excess of the amount that would have been collected under the rate prescribed in order No. 3388 of the Corporation Commission, a part of which excess was covered by the supersedeas bonds given by Oklahoma Gas and Electric Company upon the taking of the appeal to the Supreme Court of the State of Oklahoma from the order of the Corporation Commission (T. 26, 44).

For reasons unnecessary to mention (T. 59), this suit in the United States District Court was dismissed on May 18, 1932, and refiled on May 20, 1932 (T. 97). The Delaware corporation was joined therein as a defendant. A three-judge court convened pursuant to Section 266 of the Judicial Code, dismissed the cause on the ground that the invalidity of the order of the Commission could be pleaded as a defense in the action filed by Wilson & Company, Inc., of Oklahoma (Delaware) in the state District Court and

that complainants therefore had an adequate remedy at law in the state court (T. 75, 81). An appeal was prosecuted from such dismissal to this court (*Oklahoma Gas & Electric Co. et al. v. Oklahoma Packing Co. et al.*, 292 U. S. 386), which reversed the District Court, holding that the suit did not fall within Section 266 of the Judicial Code and that the appeal had mistakenly been taken to this Court.

After remand, the case was tried by the United States District Court for the Western District of Oklahoma before one judge, and resulted in a judgment holding the order of the Corporation Commission invalid, enjoining Wilson & Co., Inc., of Okla. (Delaware) from prosecuting its action in the state court and denying an injunction against the Corporation Commission, but without prejudice to further action by respondents here, should the Commission threaten or endeavor to enforce such order. Findings of fact and conclusions of law were made (T. 86) and an opinion filed (T. 97). An appeal was prosecuted by petitioners herein, but not by the Corporation Commission or any of its members, to the United States Circuit Court of Appeals for the Tenth Circuit, which affirmed the District Court. *Oklahoma Packing Company et al. v. Oklahoma Gas & Electric Company et al.*, 100 Fed. (2d) 770. This Court, on April 17, 1939, granted certiorari (T. 213).

Shortly prior to the decision in this case by the United States District Court the Supreme Court of Oklahoma reversed the state district court, which had rendered judgment in favor of Wilson & Co., Inc., of Oklahoma (Delaware). *Oklahoma Gas & Electric Co. v. Wilson & Co.*, 178



Okla. 604. The Supreme Court therein stayed all further proceedings in the State District Court until the validity of the Corporation Commission's order is finally determined in this action.

### ANSWER TO PETITIONERS' PROPOSITION I.

(*Petitioners' Brief, page 10*)

Petitioners contend that the Supreme Court of the state, in affirming the order of the Corporation Commission (*Oklahoma Gas & Electric Co. v. Wilson & Co., Inc.*, 146 Okla. 272, 288 Pac. 316), acted in its judicial as distinguished from its legislative capacity and, that, its decision is *res adjudicata* of the issues in the present suit (*Petitioners' Brief, p. 10*).

The Circuit Court of Appeals, in *Oklahoma Gas & Electric Company v. Wilson & Co.*, 54 Fed. (2d) 596, held that the Supreme Court of the state in affirming the Commission's order acted legislatively. This decision is *res judicata* as to the parties here. (Compare *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 291). That opinion was cited by the Supreme Court of the state in *City of Poteau v. American Indian Oil & Gas Co. et al.*, 159 Okla. 240, 242, 243, and the case of *Oklahoma Gas & Electric Co. v. Wilson & Co.*, 146 Okla. 272, 288 Pac. 316, is also referred to therein.

In *McAlester Gas & Coke Co. v. Corporation Commission et al.*, 101 Okla. 268, 270, the state court specifically approved the procedure followed herein to obtain a judicial review of the Commission's order.

On the 17th of October, 1936, in *Oklahoma Cotton Ginners Ass'n et al. v. State et al.*, 174 Okla. 243, the Supreme Court of the state held that its review of orders similar to that involved herein was judicial. An interesting discussion of some of the cases in which it had held to the contrary will be found on page 251, where reference is also made to the cases of *Oklahoma Gas & Electric Co. v. Wilson & Co.*, 54 Fed. (2d) 596, and *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290.

The order of the Corporation Commission herein was entered on the 13th of April, 1926. The opinion on appeal was filed by the Supreme Court of the state on April 29, 1930 (*Oklahoma Gas & Electric Co. et al. v. Wilson & Co. et al.*, 146 Okla. 272), and respondents here could not anticipate in 1930 that the Supreme Court of the state in 1935 would change its position in regard to the capacity in which it reviewed a certain class of orders appealed from the Corporation Commission.

A situation very similar to that presented herein was before this Court in *Corporation Commission of Oklahoma et al. v. Cary, Trustee*, 296 U. S. 452. The Supreme Court of Oklahoma, in *Oklahoma Gas & Electric Co. v. Wilson & Co.*, 178 Okla. 604, opinion filed September 15, 1936, in reversing the District Court of Oklahoma County and directing that all further proceedings by Wilson & Company to enforce the order be stayed pending final determination of the instant suit, said:

"In the instant case, in view of the fact that defendants' right to a judicial remedy in the state courts was uncertain, the Federal Court acquired jurisdiction of

the cause instituted therein by defendants. That remedy was available to them as the only certain method of obtaining a judicial determination of the validity of the Commission's order. *The suit was a direct attack upon such order, and until its validity was established in that suit the state court was without jurisdiction to proceed with an action based upon such order. This for the reason that where direct attack in equity is made upon the order of the Commission the defendant's liability on such order is not finally determined judicially until final determination of the equitable action. See Pioneer Tel. & Tel. Co. v. State, 40 Okla. 417, 138 Pac. 1033.*" (Italics ours.)

It is well settled that what effect a judgment of a state court shall have as *res judicata* is a question of State law. *Union & Planters Bank v. Memphis*, 189 U. S. 71, 75; *Nev-Cal Electric Securities Co. v. Imperial Irr. Dist. et al.*, 85 Fed. (2d) 886, 898.

## ANSWER TO PETITIONERS' PROPOSITION II.

(*Petitioners' Brief, page 13*)

It is contended that under Section 265 of the Judicial Code the lower court erred in enjoining petitioners from endeavoring to enforce the order of the Corporation Commission by means of the suit in the District Court of Oklahoma County. Respondents, in their petition herein (T. 8, 9 and 10), allege that the action filed in the District Court of Oklahoma County was commenced and is being prosecuted for the purpose of harassing and annoying them. The Supreme Court of the state, in *Oklahoma Gas & Electric*

*Company et al. v. Wilson & Company, Inc.*, 178 Okla 604, 606, has held that the District Court of Oklahoma County was without jurisdiction to proceed with that action until the final determination of the validity of the Corporation Commission's order in *this equitable action*. The situation is very similar to that presented in *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239, 244, 246.

It is contended by petitioners that the case of *Steelman v. All Continent Co.*, 301 U. S. 278, 290, 291, cited by the Circuit Court of Appeals in its opinion, "is not applicable for the reason that it involved a proceeding in bankruptcy, which is specifically excepted in Section 265, and, further, that section was not under consideration." (Petitioners' Brief, pp. 15-16.) The appellant in the *Steelman* case was not seeking an injunction authorized by any law relating to proceedings in bankruptcy, and the cases cited in the opinion are not bankruptcy cases, several specifically referring to Section 265 of the Judicial Code.

### ANSWER TO PETITIONERS' PROPOSITION III.

(*Petitioners' Brief, page 16*)

#### VENUE

On the question of venue the trial court found (T. 95):

"Prior to the commencement of this action Wilson & Company, Inc., of Oklahoma, a Delaware corporation, qualified, as provided under the statutes of the State of Oklahoma, to do a local business as a foreign corporation in the State of Oklahoma and at the time of and prior to such institution of this action was so doing a local

business in Oklahoma County, Oklahoma. In connection with such qualification and as provided by the statutes of the State of Oklahoma said foreign corporation duly executed in writing and filed with the proper officers of the State of Oklahoma an appointment of an agent upon whom service of process might be had in any action in the State of Oklahoma to which said company may be a party and consenting that such service should be due and legal service on the company and that all actions against it might be brought in the county in which the cause of action arose."

As stated by the Circuit Court of Appeals in its opinion such finding was not excepted to or otherwise challenged in the trial court. (T. 206).

Moreover, it is well settled that a corporation cannot do a local business in a state other than that of its incorporation without the consent of such state. The consent can be arbitrarily refused, or reasonable conditions may be attached thereto.

*Bank of Augusta v. Earle*, 13 Peters, 519, 584, 487.

*Paul v. Virginia*, 8 Wall. 168, 181.

*Horn Silver Mining Co. v. New York*, 143 U. S. 305, 315.

*Hemphill v. Orloff*, 277 U. S. 537, 548.

*Fidelity & Deposit Co. v. Tafoya et al.*, 270 U. S. 426, 434.

*Hanover Ins. Co. v. Harding*, 272 U. S. 494, 507.

*Washington et al. v. Superior Court, etc., et al.*, 289 U. S. 361, 364, 365.

*Atlantic Refining Co. v. Virginia*, 302 U. S. 22, 26.



The condition imposed by Oklahoma on foreign corporations for transacting local business within the state, that they agree to be sued in the county in which the cause of action arose, was reasonable. *Ex Parte Schollenberger*, 96 U. S. 369. See also *Lafayette Ins. Co. v. French*, 18 How. 404; *Railroad Co. v. Harris*, 12 Wall. 65; *Conn. Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 613, 614.

The condition in the instant case did not require the surrender of any constitutional right. *Hanover Fire Ins. Co. v. Harding*, 272 U. S. 494, 507; *Terral v. Burke Construction Co.*, 257 U. S. 529, 532; *Frost Trucking Co. v. R. R. Com.*, 271 U. S. 583; *Power Mfg. Co. v. Saunders*, 274 U. S. 490, 496, 497; and compare *Atlantic Refining Co. v. Virginia*, 302 U. S. 22; *Washington v. Superior Court*, 289 U. S. 361, 365.

The venue statute, Section 51 of the Judicial Code, 28 U. S. C. A. 112, does not limit the jurisdiction of the District Courts. In the instant case the United States District Court for the Western District of Oklahoma had jurisdiction, since the suit arose under the Constitution of the United States. The venue statute, as distinguished from the statute defining the jurisdiction of District Courts, confers a personal privilege, which may be waived in various ways, express or implied. *Ex parte Schollenberger*, 96 U. S. 369, 378; *In re: Moore*, 209 U. S. 490; *Western Loan & Savings Co. v. Butte Mining Co.*, 210 U. S. 368; *Lee v. C. & O. Railway Co.*, 260 U. S. 653, 655; *Peoria & Pekin Union Ry. Co. v. United States et al.*, 263 U. S. 528, 536; *Commercial Casualty Co. v. Consolidated Stone Co.*, 278 U.

S. 177, 179; *Seaboard Rice Milling Co. v. C., R. I. & P. Ry. Co.*, 270 U. S. 363, 367.

The consent of a foreign corporation, desiring to do a local business in Oklahoma, to suit in the local courts is not an unreasonable requirement. Its purpose is apparent, and we believe salutary. A citizen of Oklahoma should not be compelled on a cause of action arising in Oklahoma against a foreign corporation, which he desires to bring in the federal court, to go back to the state where the corporation was chartered, to Delaware in this instance. This would seem especially true since the foreign corporation, if sued in a state court, jurisdictional elements being present, could remove the case to a federal court. The consent to be sued herein applied both to state and federal courts. *Ex parte Schollenberger*, 96 U. S. 369, and *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362.

The *Schollenberger* case (96 U. S. 369) was decided prior to the amendment of the Federal Venue Statute at a time when the statute provided that the presence or finding of a corporation within the district where suit was brought was sufficient. The important principle, however, running through the case, and which we respectfully submit was not affected by the change in the venue statute, is that a foreign corporation may consent to or waive lack of venue, and such agreement may be made prior to the institution of suit. Jurisdiction in the *Schollenberger* case was based on diversity of citizenship. The fact that jurisdiction in the instant case is grounded on a federal question presents

an unimportant difference. *In re: Keasbey and Mattison*, 160 U. S. 221; *St. Louis & San Francisco Ry. Co. v. McBride*, 141 U. S. 127, 131.

The doubt expressed by petitioners in regard to this question we believe has been occasioned by *Southern Pacific Co. v. Denton*, 146 U. S. 202, wherein the plaintiff, an inhabitant of the Eastern District of Texas, brought suit in the Federal Court in the Western District against a Kentucky corporation doing business in the latter district, the jurisdiction resting on diversity of citizenship. A statute of Texas required that a foreign corporation seeking to transact a local business therein should agree not to remove cases to the federal courts and, further, that it appoint a service agent. This Court held the entire statute bad, due to the removal provision, which is first discussed. The Court next takes up the venue question, and discusses it just as if the Texas statute were separable. When the strict limits of the agreement in the *Denton* case are kept in mind, it in no wise conflicts with anything said in the *Schollenberger* case, which is cited therein. In commenting on the agreement the Court said (p. 207):

"Moreover, the supposed agreement of the corporation went no further than to stipulate that process might be served on any officer or agent engaged in its business within the State. It did not undertake to declare the corporation to be a citizen of the State, nor \* \* \* to alter the jurisdiction of any court as defined by law."

It will be observed that the agreement dealt with service of process only, and did not affect venue. It fell short of

the agreement approved by the *Schollenberger* case, wherein, at page 370, it was said:

"\* \* \* If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."

In the *Denton* case, as we have pointed out, there was an agreement for the appointment of an agent for service, but it was not broad enough to constitute a waiver of venue. It is also important to note in considering the *Denton* case that if the Court did not have in mind the distinction we are endeavoring to draw, a discussion of the venue question and the effect of the particular agreement would have been unnecessary, since the Court had disposed of the removal question, by holding the consent void as requiring,

"as a condition precedent to obtaining a permit to do business within the state, to surrender the right and privilege secured to it by the Constitution and laws of the United States was unconstitutional and void and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions. *Insurance Co. v. Morse*, 20 Wall. 445; *Barron v. Burnside*, 121 U. S. 186; *Texas Land Co. v. Worsham*, 76 Tex. 556."

It is fair to assume, therefore, were petitioners' position herein correct, that the court would have disposed of it in the same manner as that of removal, instead of pointing out that the appointment of a service agent alone was not sufficient to constitute a waiver of or consent to venue.

The latter portion of the opinion deals with the Texas Practice Act, which made a special appearance, "a waiver of immunity from the jurisdiction by reason of nonresidence." The Court held that the Conformity Act did not require the adoption of a state practice act, which would compel a defendant to waive venue.

Later, in *In re: Hohorst*, 150 U. S. 653, this Court again indicated the narrow limits of the agreement in the *Denton* case:

"It is contended in behalf of the company that this case was governed by the recent decisions of this court in *Shaw v. Quincy Mining Co.*, 145 U. S. 444, and *Southern Pacific Co. v. Denton*, 146 U. S. 202, but those decisions went no further than to hold that within the meaning of the judiciary acts a corporation cannot be considered as a citizen, an inhabitant or a resident of the state in which it has not been incorporated; and that under the Act of 1888 a corporation incorporated in one of the United States and in that state only cannot be compelled to answer in another state in which it has a usual place of business and of which the plaintiff is not a citizen."

It is apparent from the foregoing that the holdings in the *Shaw* and *Denton* cases are considered the same. In the *Shaw* case there was no agreement, and in the *Denton* case there was likewise no agreement insofar as venue is concerned. Mr. Justice GRAY wrote the opinions in the *Shaw*, *Denton* and *Hohorst* cases. Mr. Justice GRAY also wrote the opinion in *It re: Keasbey & Mattison*, 160 U. S. 221, wherein, at page 229, the following appears:

"And it is established by the decisions of this court, that within the meaning of this Act a corporation can-



not be considered a citizen, an inhabitant or a resident of the state in which it has not been incorporated; and, consequently, that a corporation incorporated in a state of the Union cannot be compelled to answer to a civil suit at law or in equity in a Circuit Court of the United States held in another state, even if the corporation has a usual place of business in such state. *McCormick Co. v. Walters*, 134 U. S. 41, 43; *Shaw v. Quincy Mining Co.*, 145 U. S. 444; *Southern Pac. Co. v. Denton*, 146 U. S. 202.

"Those cases, it is true, were of the class in which the jurisdiction is founded only upon the fact that the parties are citizens or corporations of different states. But the reasoning on which they proceed is equally applicable to the other class mentioned in the same section, of suits arising under the Constitution, laws or treaties of the United States; and the only difference is that by the very terms of the statute a suit of this class is to be brought in the district in which the defendant is an inhabitant, and cannot, *without the consent of the defendant*, be brought in any other district, even in one in which the plaintiff is an inhabitant." (Italics ours.)

By the use of the word "*compelled*" in one paragraph of the foregoing quotation and the words "*without the consent of the defendant*" in the next paragraph, the distinction is clearly brought out and shows the sense in which the Court used the word "*compelled*" in the *Shaw*, *Denton* and *Hohorst* cases, and that it was understood to apply only to instances where there was no consent to or waiver of venue.

Wherefore, respondents respectfully pray that the judgment of the Circuit Court of Appeals herein be in all things affirmed.

Respectfully submitted,

ROBERT M. RAINEY,  
I. J. UNDERWOOD,  
STREETER B. FLYNN,  
CALVIN JONES,  
*Attorneys for Respondents.*

RAINEY, FLYNN, GREEN & ANDERSON,  
ALLEN, UNDERWOOD & CANTERBURY,  
*Of Counsel.*





In the Supreme Court of  
the United States

OCTOBER TERM, 1939

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OKLAHOMA PACKING COMPANY, Formerly Wilson &  
Co., Inc., of Oklahoma, an Oklahoma Corporation,  
and WILSON & Co., INC., OF OKLAHOMA, a Delaware  
Corporation,

*Petitioners,*

VERSUS

OKLAHOMA GAS & ELECTRIC COMPANY, a Corporation;  
OKLAHOMA NATURAL GAS COMPANY, a Corporation;  
W. T. PHILLIPS, JR., H. J. CRAWFORD, J. V. RITTS,  
LEONARD C. RITTS, R. W. HANNAN, A. W. LEONARD,  
and R. C. SHARP, the Directors of Oklahoma Natural  
Gas Company, a Dissolved Corporation and Okla-  
homa Natural Gas Corporation,

*Respondents.*

---

**PETITION OF THE RESPONDENTS FOR A  
REHEARING**

---

I. J. UNDERWOOD,

R. M. RAINEY,

STREETER B. FLYNN,

*Counsel for Respondents.*

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In the Supreme Court of the United States

OCTOBER TERM, 1939

---

OKLAHOMA PACKING COMPANY, Formerly Wilson & Co., Inc., of Oklahoma, an Oklahoma Corporation, and WILSON & Co., Inc., of OKLAHOMA, a Delaware Corporation,

*Petitioners,*

VERSUS

OKLAHOMA GAS & ELECTRIC COMPANY, a Corporation; OKLAHOMA NATURAL GAS COMPANY, a Corporation; W. T. PHILLIPS, JR., H. J. CRAWFORD, J. V. RITTS, LEONARD C. RITTS, R. W. HANNAN, A. W. LEONARD, and R. C. SHARP, the Directors of Oklahoma Natural Gas Company, a Dissolved Corporation and Oklahoma Natural Gas Corporation,

*Respondents.*

---

**PETITION OF THE RESPONDENTS FOR A REHEARING**

---

**PETITION FOR REHEARING**

Come now the above named respondents, Oklahoma Gas & Electric Company, a corporation, Oklahoma Natural Gas Company, a corporation, W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp, the Directors of Oklahoma Natural Gas Company, a dissolved corporation, and Oklahoma Natural Gas Corporation, and present this, their pe-

tion for a rehearing of the above entitled cause, and in support thereof, respectfully show:

We desire to offer a very humble apology to the Court for our failure to clarify the nature of the action dealt with by the Supreme Court of the State in the case of *Oklahoma Gas & Electric Co. v. Wilson & Co.*, 178 Okla. 604, and to cite in our brief the case of *Community Natural Gas Co. v. Corporation Commission et al.*, 182 Okla. 137, decided January 25, 1938.

### FIRST GROUND FOR REHEARING

In view of our familiarity with the Oklahoma practice, the thought that the opinion in *Oklahoma Gas & Electric Co. v. Wilson & Co.*, 178 Okla. 604, could be construed to sustain a plea of *res judicata* did not occur to us until suggested in the oral argument before this Court. We respectfully suggest that this Court in its statement that "*inasmuch as the scope of the present suit is precisely the same as that of the action in the state court*" shows clearly that it misapprehended the issues which could be adjudicated in said state court action, wherein the recovery of a refund was sought, a portion of which was covered by the supersedeas bonds (see amendment to complaint<sup>o</sup> R. 85). The suit in the state court was a law action. Under the practice in Oklahoma, a party claiming to be injured by an order of the Corporation Commission which had been affirmed by the Supreme Court legislatively had a right to test the validity of such order in an independent suit in equity, either in a state or a federal court, before a refund



action could proceed. It was in view of such right that the Supreme Court of Oklahoma, in 178 Okla. 604, gave the right-of-way and precedence to this suit in equity. This is explained in the case of *Pioneer Tel. & Tel. Co. v. State*, 40 Okla. 417, 429:

"Said Section 24 of Article 9, therefore, cuts off the right of a judicial review as to the validity of said order, in an action brought to enforce the refund, but the right to invoke equity jurisdiction by the transmission company to have said order declared invalid is not denied, for such proceeding is not collateral but direct. \* \* \* The remedy by law not being available; that by equitable cognizance is. A judicial review by invoking equitable powers being afforded under the provisions of this Constitution, a direct attack was available to appellant to have declared void said order of the the Commission of October 12, 1908. This constituted due process of law." (Italics ours.)

(The Pioneer case is cited and is the basis of the opinion in 178 Okla. 604, 606, and it is again referred to in *Community Natural Gas Co. v. Corporation Commission*, 182 Okla. 137.) In the light of its holding in the Pioneer case the Supreme Court, in 178 Okla. 604, in referring to the suit in the federal court, said:

"The suit was a direct attack upon such order, and until its validity was established in that suit, the state court was without jurisdiction to proceed with an action based upon such order." (Italics ours.)

It is, therefore, clear that the reason the Supreme Court of Oklahoma in 178 Okla. 604 stayed the action in the state district court was for want of jurisdiction in that court to proceed, and not because of the application of any doctrine

of comity. The State Supreme Court's action would have been the same had this suit in equity attacking the order been pending in a state court instead of in the federal court.

In view of the foregoing explanation, and in view of the later and more extended discussion found in *Community Natural Gas Co. v. Corporation Commission*, 182 Okla. 137, it is clear that the Court, in 178 Okla. 604, held as follows:

*First:* That the validity of an order of the Corporation Commission cannot be questioned in an action at law to recover a refund.

*Second:* That the validity of an order of the Corporation Commission is only subject to attack in a suit in equity.

*Third:* That a district court of the state is without jurisdiction to proceed in a refund case until the validity of the Commission's order, if questioned, is first established in a suit in equity.

*Fourth:* That the decision in the Ginnery case was not a bar to the equitable remedy "*which was available to them as the only certain method of obtaining a judicial determination of the validity of the Commission's order.*" (178 Okla. 604). (Italics ours.)

## SECOND GROUND FOR REHEARING

Turning now to the case of *Community Natural Gas Co. v. Corporation Commission*, 182 Okla. 137, it is certain that it removes any misunderstanding in regard to the holding of the Court in 178 Okla. 604, and sets at rest the divergent views expressed in the majority and minority opinions herein on the question of *res judicata*, based on that decision.

Whether the case of *Oklahoma Gas & Electric Co. v. Wilson & Co.*, 146 Okla. 272, decided in 1930, is sufficient to generate *res judicata* is a question of state law, and that question is settled by the *Community* case (182 Okla. 137).

The *Community Gas Company* just as did respondents herein, appealed to the Supreme Court of the State from an adverse order of the Corporation Commission (170 Okla. 292 (1934)). At the time of the first appeal of the instant order and the decision (146 Okla. 272— 1930) and at the time of the first appeal and decision in the *Community* case (170 Okla. 292 — 1934) the review by the State Supreme Court was legislative (182 Okla. 137 — 1938). After the decisions on both appeals the Court decided the *Ginners'* case (174 Okla. 243 — 1935).

The appeal from the judgment of the state district court, in the suit on the supersedeas bonds thereafter came before the state court. *Oklahoma Gas & Electric Co. v. Wilson & Co.*, 178 Okla. 604 (1936, rehearing denied 1937).

The case was reversed with directions that the suit in the state district court be stayed pending the determination

Court. In the Community Gas Case, on the second appeal (182 Okla. 137 — 1938) it was urged that all matters passed upon in the former appeal were res judicata in view of the subsequent decision in the Ginn's case (174 Okla. 243 — 1935). Such plea was denied and the state Court expressly recognized and enumerated some of the inequitable results which would flow from the application of such a rule. Some excerpts from the Court's four-page discussion of this question are as follows:

"Thereafter, this court in the case of Oklahoma Cotton Ginn's Ass'n v. State, 174 Okla. 243, 51 Pac. (2d) 327, overruled our earlier opinions saying that appeals from rate orders \* \* \* were legislative, and held that such appeals were judicial (page 140).

"Therefore, any later announcements of law upon the same, or other cases, do not suffice to change the essential nature of our previous action in relation to the order considered on the former appeal (page 141).

"The primary question of law before us is whether in the light of the opinion in the Ginn's Case, supra, we are to adhere strictly to our former opinion, and treat all matters touched upon therein as res judicata, or whether, acting in a judicial capacity, we are to refuse approval to the latest orders of the commission under the circumstances of the case as they now exist. To adopt the first alternative would be manifestly inequitable. We failed to speak definitely upon the issue in our former opinion, and took steps which were legislative in nature (page 141).

"If we had said we were acting judicially, then Community would have had an opportunity to seek a review

by the supreme Court of the United States of our application of the law relative to the federal questions (page 141).

"In view of what we have pointed out concerning the former order of the commission, and our opinion thereon, we think it would be manifest injustice to now hold that later views of law impel an adherence to the strict letter of that opinion as approving in a judicial review the legislative action therein considered (page 142).

"Community should not be charged with the waiver of any of its rights for its failure to pursue one of the remedies, when we did not then think it could do so because the legislative order was not yet final. **NOR DO WE THINK THAT WE SHOULD NOW HOLD THAT THE RULE OF RES JUDICATA APPLIES AND FORBIDS A JUDICIAL REVIEW THEREOF NOW.**" (p. 142.)

"We will be saying now that we acted judicially earlier, and that Community is to be penalized for its lack of ability to anticipate changes in the views of this court on the law" (p. 143). (All italics ours.)

That the Supreme Court of the State never intended its decision in the Ginnets' case to deny to litigants such as respondents herein and the Community Natural Gas Company their day in court does not admit of doubt, and the Court, in its opinion, in order to show that it adhered to and was governed by the rules of fair play, points out that even could a legislative decision by any chance be considered as the basis for *res judicata*, the Court would



not hesitate, in order to defeat such rule's application, to apply some other rule.

The Supreme Court of Oklahoma in the Community case has painstakingly reviewed the question, we believe, in order that there could be no possible doubt that its stated change in decision would not work any departure from or denial of the plain requirements of justice.

### THIRD GROUND FOR REHEARING

The *Community Gas* case, 182 Okla. 137, in addition to passing on the question of *res judicata*, positively holds that the *Ginn's* case, 174 Okla. 243, overruled the prior decisions of the Court dealing with the capacity in which it reviewed appeals from orders of the Corporation Commission in gas rate cases prior to the *Ginn's* case. The review of the instant order of the Commission in 146 Okla. 272 (1930) was, therefore, clearly legislative. In view of this fact we invoke our constitutional right to due process under the rule announced by this Court in *Brinkerhoff-Faris v. Hill*, 281 U. S. 673.

"Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

The State Court, in 178 Okla. 604, and in the *Community* case, 182 Okla. 137, clearly sought to comply with

#### PETITION OF THE RESPONDENTS FOR A REHEARING

the federal guaranty of due process which "extends to state action through its judicial as well as through its legislative, executive or administrative branch of government." (*Brinkerhoff-Faris v. Hill, supra.*)

Had the State Court, however, not recognized its obligation, and had it held appeals prior to the Ginners' case from orders of the Corporation Commission could generate *res judicata*, in view of its recognized and stated change in decision, it would be the duty of this Court to see that respondents herein were afforded due process of law, and not to permit a change in decision by the State Court to deny respondents their day in court.

#### FOURTH GROUND FOR REHEARING

We respectfully request the Court to reconsider its holding that the injunction granted by the trial court, and approved by the Circuit Court of Appeals, is prohibited by Section 265 of the Judicial Code, "and not taken out of it by any of the exceptions which this Court has heretofore engrafted upon this act." We still think, as set forth in the dissenting opinion of this Court and in the opinion of the Circuit Court of Appeals below, that the decree enjoining enforcement of the Commission's order appropriately follows the determination of its invalidity, and that enjoining the prosecution of the action in the State Court upon the supersedeas bond is only one of technical importance.

We wish to direct the Court's attention to the fact

that no mention was made in the majority opinion of the case of *Steelman v. All-Continent Corp.* 301 U. S. 278, cited at page 8 of respondents' brief, which we think supports our position.

In that case this Court, in an opinion by Mr. Justice CARDOZO, said:

"What he seeks is an injunction directed to a suitor, and not to any court, upon the ground that the suitor is misusing a jurisdiction which by hypothesis exists, and converting it by such misuse into an instrument of wrong. \* \* \* Suits as well as transfers may be the protective coverings of fraud. \* \* \* We are unable to yield assent to the statement of the court below that 'the restraint of a proper party is legally tantamount to the restraint of the court itself.' The reality of the distinction has illustration in a host of cases" (Italics ours).

In addition, we cannot see any distinction between enjoining a party before he has obtained a judgment which would be contrary to recognized principles of equity and the standards of good conscience, and enjoining him after he has obtained such a judgment.

In view of what the Supreme Court of Oklahoma said and did, as evidenced by its opinion in 178 Okla. 604, it seems to us that the circumstances are such as to make a strong appeal to a court of equity, especially when the merits of the controversy are not questioned by appellants. Respondents having invoked the jurisdiction of a Federal Court of equity on a federal question, and that Court having determined the invalidity of the order

of the Commission; there seems to be no good reason why complete relief should not be afforded, in accordance with recognized principles of equity. There is no substantial reason why this long and involved litigation should not come to an end.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the United States District Court be, upon further consideration, affirmed. In the alternative, if the Court finally concludes that restraint of petitioner by the injunctive feature of said judgment is prohibited by Section 265 of the Judicial Code, then, it is respectfully urged that the injunctive provisions of said judgment alone should be vacated and the remaining portions thereof should be affirmed.

Respectfully submitted,

I. J. UNDERWOOD,

R. M. RAINEY,

STREETER B. FLYNN,

*Counsel for Respondents.*

**CERTIFICATE OF COUNSEL**

I, Streeter B. Flynn, counsel for the above named respondents, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

.....  
*Counsel for Respondents.*







OCT 24 1939

No 19

CHARLES ELMORE CROPLEY  
CLERK

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1939.

OKLAHOMA PACKING COMPANY, FORMERLY WILSON  
& CO., INC., OF OKLAHOMA, AN OKLAHOMA CORPORATION,  
AND WILSON & CO., INC., OF OKLAHOMA, A  
DELAWARE CORPORATION,

*Petitioners,*

vs.

OKLAHOMA GAS AND ELECTRIC COMPANY, A CORPORATION;  
OKLAHOMA NATURAL GAS COMPANY, A CORPORATION;  
W. T. PHILLIPS, JR., H. J. CRAWFORD, J. V. RITTS,  
LEONARD C. RITTS, R. W. HANNAN, A. W. LEONARD,  
AND R. C. SHARP, THE DIRECTORS OF OKLAHOMA  
NATURAL GAS COMPANY, A DIS-SOLVED CORPORATION;  
AND OKLAHOMA NATURAL GAS CORPORATION,

*Respondents.*

PETITION OF PETITIONERS FOR REHEARING.

W. R. BROWN,  
PAUL WARE,

*Counsel for Petitioners.*

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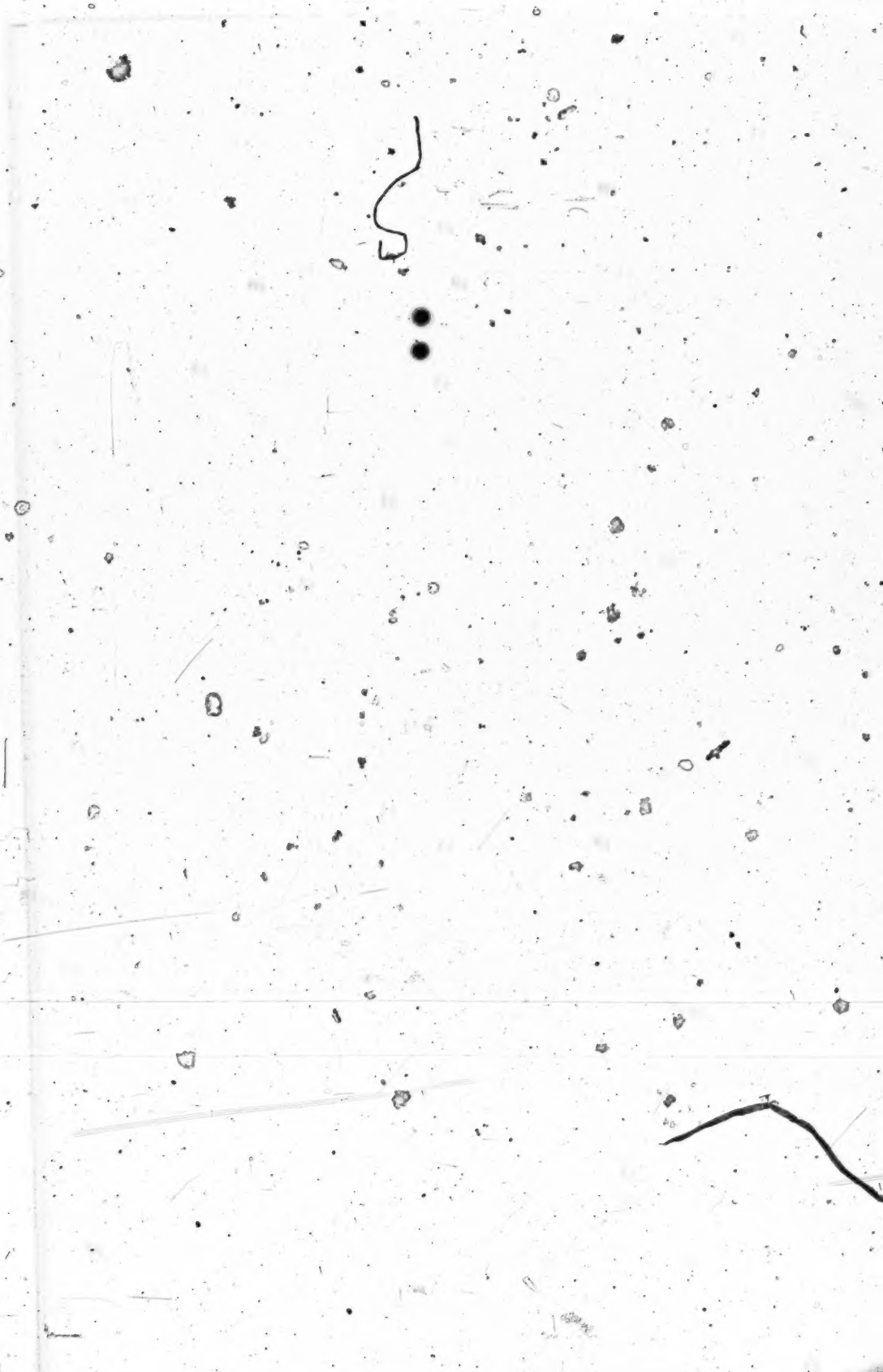
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1939.

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No. 19.

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OKLAHOMA PACKING COMPANY; FORMERLY WILSON  
& CO., INC., OF OKLAHOMA, AN OKLAHOMA CORPORA-  
TION, AND WILSON & CO., INC., OF OKLAHOMA, A  
DELAWARE CORPORATION,

*Petitioners,*

*vs.*

OKLAHOMA GAS AND ELECTRIC COMPANY, A  
CORPORATION; OKLAHOMA NATURAL GAS COM-  
PANY, A CORPORATION; W. T. PHILLIPS, JR., H. J.  
CRAWFORD, J. V. RITTS, LEONARD C. RITTS,  
R. W. HANNAN, A. W. LEONARD, AND R. C. SHARP,  
THE DIRECTORS OF OKLAHOMA NATURAL GAS COMPANY, A  
DISSOLVED CORPORATION; AND OKLAHOMA NATURAL  
GAS CORPORATION,

*Respondents.*

---

**PETITION OF PETITIONERS FOR REHEARING.**

---

Come now petitioners in the above-entitled cause and  
present this, their petition for rehearing, and in support  
thereof respectfully show:

The modification of the original opinion of this Court,  
which fails to apply the rule of *res judicata*, retroactively  
converts a 1930 judicial review by the Supreme Court of  
Oklahoma (146 Okla. 272) into a legislative review by the

adoption of respondents' erroneous interpretation and application of the decision in *Community Natural Gas Co. v. Corporation Commission*, 182 Okla. 137. In that case, the Oklahoma Supreme Court, in 1938, correctly refused to apply the principle of *res judicata*, and thereby convert its 1930 legislative review and order into a judicial adjudication, for the same reasons announced by this Court in *Prentis v. Atlantic Coast Line*, 211 U. S. 210.

In the first *Community Gas* case,<sup>1</sup> the order of the Corporation Commission, which was reviewed by the Oklahoma Supreme Court in 1934, was a temporary rate order. This first review was repeatedly characterized by that Court in the second appeal, 182 Okla. 137, at page 140, as follows:

"The action which we took was legislative in character, for we not only examined the record, but we corrected what the Commission had done and substituted our own order therefor."

(See similar statements at pages 139, 141.)

The character and nature of that Court's original review (170 Okla. 292) was not sufficient to generate *res judicata*. On the second appeal (1938), the Court correctly refused to retroactively change the nature of the original review merely because the *Ginners* case<sup>2</sup> had been decided in the interim.

That is neither the situation nor the contention of petitioners in the case at bar. The order involved in this case is not a rate order. The Oklahoma Supreme Court in 1930, *Oklahoma Gas and Elec. Co. v. Wilson & Co.*, 146 Okla. 272, affirmed an order of the Commission directing respondent to discontinue its discrimination; i. e., to serve gas to the Wilson plant at the Gas Company's voluntarily and previously established rate, which is charged other consumers similarly situated. The 1930 decision was in

1. *Lone Star Gas Co., et al. v. Corporation Commission, et al.*, (1934) 170 Okla. 292.

2. *Oklahoma Cotton Ginners' Assn. v. State*, 174 Okla. 243.

and of itself sufficient to generate *res judicata* without any reference to the subsequent decision of that Court in the *Ginners'* case, or in the second *Wilson* case (*Oklahoma Gas and Elec. Co. v. Wilson & Co.*, 178 Okla. 604). The *Ginners'* case merely clarifies the soundness of the Oklahoma Court's action in 1930 that when appropriate questions for judicial determination are presented to it for review, its decision thereon is judicial in character. Neither is reference necessary to the second *Wilson* case (178 Okla. 604) other than to point out that when respondents contended that the 1930 judgment was legislative, that Court replied that it was judicial.

The Supreme Court of Oklahoma in the *Community Gas* case did not announce any peculiar local exceptions to the general rule of *res judicata* but only held that that principle had no application where the previous review of that Court was legislative in character.

We respectfully submit that the judicial review by the Oklahoma Supreme Court (146 Okla. 272) should be given that "finality by this Court which is the essence of *res judicata*."

Respectfully submitted,

W. R. BROWN,  
PAUL WARE.

#### CERTIFICATE OF COUNSEL.

I, Paul Ware, Counsel for the above-named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

PAUL WARE,  
Counsel for Petitioner.





FILE COPY  
No. 19

U.S. DISTRICT COURT  
OCT 24 1939  
CHARLES E. DROPLEY  
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1939.

OKLAHOMA PACKING COMPANY, FORMERLY WILSON  
& CO., INC., OF OKLAHOMA, AN OKLAHOMA CORPORATION,  
AND WILSON & CO., INC., OF OKLAHOMA, A  
DELAWARE CORPORATION,

*Petitioners,*

vs.

OKLAHOMA GAS AND ELECTRIC COMPANY, A CORPORATION;  
OKLAHOMA NATURAL GAS COMPANY, A CORPORATION;  
W. T. PHILLIPS, JR., H. J. CRAWFORD, J. V. RITTS,  
LEONARD C. RITTS, R. W. HANNAN, A. W. LEONARD,  
AND R. C. SHARP, THE DIRECTORS OF OKLAHOMA NATURAL GAS  
COMPANY, A DISSOLVED CORPORATION; AND OKLAHOMA NATURAL GAS  
CORPORATION,

*Respondents.*

**PETITIONERS' MOTION TO RECALL MANDATE AND FOR LEAVE  
TO FILE THEIR PETITION FOR REHEARING.**

W. R. BROWN,  
PAUL WARE,

*Counsel for Petitioners.*



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1939.

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No. 19.

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OKLAHOMA PACKING COMPANY, FORMERLY WILSON  
& CO., INC., OF OKLAHOMA, AN OKLAHOMA CORPORATION,  
AND WILSON & CO., INC., OF OKLAHOMA, A  
DELAWARE CORPORATION,

*Petitioners,*

*vs.*

OKLAHOMA GAS AND ELECTRIC COMPANY, A CORPORATION;  
OKLAHOMA NATURAL GAS COMPANY, A CORPORATION;  
W. T. PHILLIPS, JR., H. J. CRAWFORD, J. V. RITTS,  
LEONARD C. RITTS, R. W. HANNAN, A. W. LEONARD,  
AND R. C. SHARP, THE DIRECTORS OF OKLAHOMA NATURAL  
GAS COMPANY, A DIS-SOLVED CORPORATION;  
AND OKLAHOMA NATURAL GAS CORPORATION,

*Respondents.*

---

**PETITIONERS' MOTION TO RECALL MANDATE  
AND FOR LEAVE TO FILE THEIR PETITION FOR  
REHEARING.**

---

Come now petitioners in the above-entitled cause and respectfully move this Honorable Court to recall the mandate heretofore issued on January 19, 1940, to the Clerk of the United States District Court for the Western Dis-

trict of Oklahoma, and for leave to file their petition for rehearing, for the reason that this Court, we respectfully submit, has misapprehended the decision of the Supreme Court of Oklahoma in *Community Natural Gas Co. v. Corporation Commission*, 182 Okla. 137, as more fully appears in said petition which is tendered herewith.

WHEREFORE, petitioners pray that an order of this Court be entered in accordance with the foregoing motion.

Dated at Chicago, Illinois, this 22nd day of January, 1940.

W. R. BROWN,

PAUL WARE,

*Counsel for Petitioners.*

**CERTIFICATE OF COUNSEL**

I, Paul Ware, Counsel for the above-named petitioners, do hereby certify that the foregoing motion is presented in good faith and not for delay.

PAUL WARE,

*Counsel for Petitioner.*



# SUPREME COURT OF THE UNITED STATES.

No. 19.—OCTOBER TERM, 1939.

Oklahoma Packing Co., formerly Wilson & Co. of Oklahoma et al., Petitioners,

vs.

Oklahoma Gas & Electric Co. et al.

On Writ of Certiorari to the Circuit Court of Appeals for Tenth Circuit.

[December 4, 1939.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

The case concerns a rate controversy which has been winding its

No. 19. Oklahoma Packing Company, formerly Wilson & Co., Inc., of Oklahoma, et al., petitioners, v. Oklahoma Gas and Electric Company et al. The decision of the Supreme Court of Oklahoma in *Community Natural Gas Co. v. Corporation Commission*, 182 Okla. 137, having been brought to the attention of this Court for the first time in the petition of respondents for a rehearing of the disposition made of this cause in the opinion delivered on December 4, 1939, that opinion is hereby withdrawn and replaced by the opinion of this day. The petition for rehearing is denied.

enarge, Gas & Electric gave a supersedeas bond. Gas & Electric lost its appeal, *Oklahoma Gas & Electric Co. v. Wilson & Co.*, 146 Okla. 272, and Wilson & Co. brought suit on the bond. That suit was instituted in one of the district courts of Oklahoma. To enjoin prosecution of the latter suit Gas & Electric invoked the jurisdiction.

<sup>1</sup> A history of the controversy is to be found in *Oklahoma Gas & Electric Co. v. Wilson & Co.*, 146 Okla. 272; *Oklahoma Gas & Electric Co. v. Wilson & Co.*, 54 F. (2d) 596; *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 6 F. Supp. 893; *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U. S. 886; *Oklahoma Gas & Electric Co. v. Wilson & Co.*, 178 Okla. 604; *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 100 F. (2d) 770.

<sup>2</sup> Oklahoma Natural Gas Co. and Oklahoma Gas and Electric Co., both engaged in the sale of natural gas in and about Oklahoma City, had agreed to a division of territory. Under that agreement, Wilson & Co. bought gas from Gas & Electric. The Oklahoma Corporation Commission found that Natural Gas had held itself out to provide gas to industrial consumers at a lower rate than that at which Wilson & Co. was able to buy from Gas & Electric. The Commission then ordered Natural Gas to provide Wilson & Co. with its gas at prevailing industrial rates. Both Natural Gas and Gas & Electric resisted the order. Natural Gas contended that it had never held itself out to industrial consumers; Gas & Electric claimed that it was being unconstitutionally deprived of its right to sell to Wilson & Co. at the higher rate. If, pending appeal from the Commission, the order were not stayed, Wilson & Co. would have been able to purchase gas from Natural Gas at the lower rate and Gas & Electric would have been forced either to lower its rates

tion of the United States District Court for the Western District of Oklahoma.<sup>3</sup> This relief was granted and sustained by the Circuit Court of Appeals. *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 100 F. (2d) 770. Since the case in part was in conflict with the Second Circuit's decision in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 103 F. (2d) 765, and also presented novel aspects of important questions of federal law, we granted certiorari, 307 U. S. —. We are not concerned with the merits of the Commission's order.

At the threshold we are met by the procedural objection, seasonably made; that Wilson & Co., a Delaware corporation, was improperly sued in the District Court of the Western District of Oklahoma. The objection is unavailable. Prior to this suit, Wilson & Co. had, agreeable to the laws of Oklahoma, designated an agent for service of process "in any action in the State of Oklahoma." Both courts below found this to be in fact a consent on Wilson & Co.'s part to be sued in the courts of Oklahoma upon causes of action arising in that state. The Federal District Court is, we hold, a court of Oklahoma within the scope of that consent, and for the reasons indicated in *Neirbo Co. et al. v. Bethlehem Shipbuilding Corp.* decided November 22, 1939, Wilson & Co. was amenable to suit in the Western District of Oklahoma.

Petitioners further urge (1) that their plea of *res judicata* should have been sustained and (2) that § 265 of the Judicial Code (Act of March 3, 1911, 36 Stat. 1162; 28 U. S. C. § 379, derived from the Act of March 2, 1793, 1 Stat. 334), was a bar to the suit.

The claim of *res judicata* is based on the prior determination in 1930 by the Supreme Court of Oklahoma that the contested order of the Corporation Commission was valid. *Oklahoma Gas & Elec. Co. v. Wilson & Co.*, 146 Okla. 272. The theory of the present bill, filed in 1932, was that the review which the Oklahoma Supreme Court afforded the respondents in 1930 was "legislative" rather than "judicial" in character, and therefore left open the judicial review sought below. After the bill was filed but before the injunction now challenged was decreed, the Oklahoma Supreme Court held

<sup>3</sup> In 1928 Natural Gas complied with the order; and since that time Wilson & Co. has been buying gas at the lower rate prescribed by the Commission. The sole question now involved in these proceedings is the liability of Gas & Electric to Wilson & Co. for alleged overcharges between 1926 and 1928. The District Court found specifically that the Corporation Commission had made no threat to enforce penalties for violations of the 1926 order, and as to the Commission, declined to grant any injunctive relief. Cf. *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U. S. 386, 390.

that its decision in a case like that of *Oklahoma Gas & Elec. Co. v. Wilson & Co.*, *supra*, was a judicial judgment. *Oklahoma Cotton Ginners' Association v. State*, 174 Okla. 243.

In view of the authoritative construction thus placed by the highest court of Oklahoma on what it had done in 1930, the respondents had in fact been accorded by the Oklahoma Supreme Court judicial review of precisely the same legal issues which it sought to re-litigate in this suit.<sup>4</sup> And by its decree in this suit the District Court made an adjudication in direct conflict with that made by the Oklahoma Court seven years earlier.

This, it is suggested, is to confound the fog, in which the scope of review of the Oklahoma Supreme Court was shrouded in 1930, with the clarify of adjudication made explicit by the *Ginners'* case in 1935. But for centuries our law has been operating on such notions of relation and in situations far more drastic and trying to individual litigants than this case presents. See *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358; Holmes, J., dissenting in *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 370. It is part of the price paid for the overriding benefits of a system of justice based on more or less general principles as against *ad hoc* determinations. For, in holding that its review of the order of the Corporation Commission was a judicial determination and therefore an adjudication of the issues sought to be re-litigated here, the Oklahoma Supreme Court did not profess to make new law or to change the old. Even if it had, and had retrospectively given judicial significance to its action in 146 Okla. 272, *res judicata* would still come into play and the only basis for relief could be an appeal to *stare decisis*. But the discouraging history of such a juristic sport as was the doctrine of *Gelpcke v. Dubuque*, 1 Wall. 175, admonishes us to adhere to a state court's declaration of its own law even though it has had a checkered unfolding. See Mr. Justice Holmes, dissenting, in *Muller v. Harlem Railroad Co.*, 197 U. S. 544, 574. But here we are not presented with the recondite difficulties of a situation comparable to *Gelpcke v. Dubuque*. The state court, as we have already indicated, did not go back on its past; it merely clarified what it had previously done.

The present case, therefore, presents a situation very different from that dealt with in *Corporation Commission v. Cary*, 296 U. S. 452. That case merely decided that the grant of an interlocutory injunction to stay enforcement of a Commission order was not an

<sup>4</sup> From this judicial determination by the Oklahoma Supreme Court, no review was sought here.

improvident exercise of judicial discretion" when at the time the decree issued the Oklahoma decisions left doubts whether or not the state law afforded judicial review, as required by the Johnson Act. (Act of May 14, 1934, 48 Stat. 775.)

Whether a state court decision serves to foreclose future litigation in the federal courts of course depends on the applicability of the state law of *res judicata* to the particular decision. *Union and Planters Bank v. Memphis*, 189 U. S. 71; *Covington v. First National Bank*, 198 U. S. 100; *Wright v. Georgia R. R. and Banking Co.*, 216 U. S. 420. In the absence of any peculiar local doctrine the generally accepted principles of *res judicata* will be assumed to govern. Nor will a particular decision be deemed excepted from the scope of *res judicata* unless the state court has explicitly so indicated. We have not learned of any Oklahoma departure from the general notions of *res judicata*. Nor has the Oklahoma Supreme Court, with full opportunity for reviewing the course of litigation arising out of the particular order, indicated that its decision of 1930 (146 Okla. 272), recognized by it as a judicial adjudication, is not to have one of the most important incidents of a judicial adjudication—finality for purposes of re-litigation.

The reliance which is placed upon *Oklahoma Gas and Electric Co. v. Wilson & Co.*, 178 Okla. 604, carries no such significance. To be sure, in that case the Oklahoma Supreme Court reversed a lower court judgment in favor of Wilson & Co. in the action which later was stayed by the District Court in the present proceedings. The Oklahoma Supreme Court did not hold that its determination in the earlier proceeding was not a final adjudication, but merely sought to define and accept the jurisdiction of the federal court in view of the uncertainty as to state law at the time federal jurisdiction was invoked. We interpret this action of the Oklahoma Supreme Court as a generous application of the doctrine of comity between state and federal courts. But in staying action in the state court to await disposition of the controversy in the federal court, the Oklahoma Supreme Court merely gave the federal court right

5 "In that instant case, in view of the fact that the defendants' right to a judicial remedy in the state courts was uncertain, the Federal court acquired jurisdiction of the cause initiated therein by defendants. That remedy was available to them as the only certain method of obtaining a judicial determination of the validity of the Commission's order. The suit was a direct attack upon such order, and until its validity was established in that suit the state court was without jurisdiction to proceed with an action based upon such order. This for the reason that where direct attack in equity is made upon the order of the Commission the defendants' liability on such order is not finally determined judicially until the final determination of the equitable action." 178 Okla. 604, 606.



of way to settle all relevant issues appropriately raised in the federal action. One of these issues was whether or not the 1930 decision of the Oklahoma Supreme Court had foreclosed further litigation in the federal court. That depended on whether or not the 1930 decision was a judicial adjudication. The holding in the *Ginnery*' case was that it was. In its 1936 decision (178 Okla. 604) the Oklahoma Supreme Court did not say, though it could have said, that its review of this very order was not judicial. On the contrary, it said that it was judicial. The situation would, of course, be wholly different had the Supreme Court of Oklahoma deemed its review in 146 Okla. 272 to have been legislative in character and as such incapable of generating *res judicata*. *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 227. We must therefore attach to its earlier judicial determination that characteristic finality which is the essence of *res judicata*.

But even if the validity of the order passed upon in 1930 (146 Okla. 272) could have been re-litigated under Oklahoma law, it should have been allowed to be so litigated in the Oklahoma courts. Whatever else the Oklahoma Supreme Court may have given to a federal district court by a show of comity, it could not have given it authority denied by Congress. The District Court exercised its jurisdiction to "stay proceedings" previously begun in the state court. Inasmuch as the scope of the present suit is precisely the same as that of the action in the state court which this suit sought to restrain, § 265 of the Judicial Code<sup>6</sup> operates as a bar upon the district court's power. The injunction below is within the plain interdiction of an act of Congress, and not taken out of it by any of the exceptions which this Court has heretofore engrafted upon that act. Compare *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239; *Simon v. Southern Railway*, 236 U. S. 115; *Wells, Fargo & Co. v. Taylor*, 254 U. S. 175. See Warren, "Federal and State Court Interference," 43 Harv. L. Rev. 354, 372-77. That the injunction which issued below was a restraint of the parties and not a formal restraint upon the state court itself, is immaterial. *Hill v. Martin*, 296 U. S. 393, 403. Cf. *Kohn v. Central Distributing Co.*, 306 U. S. 531.

The judgment below is reversed, with directions to dismiss the bill.

Reversed.

<sup>6</sup> Sec. 265 provides: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."



# SUPREME COURT OF THE UNITED STATES.

No. 19.—OCTOBER TERM, 1939.

Oklahoma Packing Company, formerly  
Wilson & Co., Inc., of Oklahoma,  
et al., Petitioners,

vs.

Oklahoma Gas & Electric Company,  
et al.

On Writ of Certiorari to  
the United States Cir-  
cuit Court of Appeals  
for the Tenth Circuit.

[December 4, 1939.]

Mr. Chief Justice HUGHES.

I concur in the reversal of the judgment upon the ground that Wilson & Co., a Delaware corporation, was not amenable to suit in the Federal District Court in Oklahoma. The question is essentially the same as that presented in No. 38, *Neirbo v. Bethlehem Shipbuilding Corporation*, decided November 22, 1939, and what was said in the dissenting opinion in that case need not be repeated here. (See, as to the scope of the consent under the Oklahoma statute, the observations of the Circuit Court of Appeals in the *Neirbo* case, 103 F. (2d) 765, 769.)

But if it be granted that the Delaware corporation was amenable to the process in question, I am unable to agree that the complainants should be denied relief because of the defense of *res judicata*. The judgment to which this effect is given was rendered by the Supreme Court of Oklahoma in 1930, sustaining, on appeal, an order of the Corporation Commission requiring gas to be furnished to Wilson & Co. at a specified rate. *Oklahoma Gas & Electric Co. v. Wilson & Co.*, 146 Okla. 272. At the time of that decision, the review by the Supreme Court of Oklahoma of such an order of the Corporation Commission was considered to be legislative in character. *Oklahoma Gas Co. v. Russell*, 261 U. S. 290, 291; *McAlester Gas & Coke Co. v. Corporation Commission*, 101 Okla. 268, 270; *City of Poteau v. American Indian Oil & Gas Co.*, 159 Okla. 240, 242, 243, in which the state court cited with approval the decision to that effect of the Circuit Court of Appeals in *Oklahoma Gas & Electric Co. v. Wilson & Co.*,

54 F. (2d) 596, 598, 599, applying the Oklahoma decisions. Compare *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U. S. 386, 388; *Corporation Commission v. Cary*, 296 U. S. 452, 458. The contention of the complainants before the state court was that the Commission's order violated their rights under the Federal Constitution. 146 Okla. 272, 281, 288. But in the view, as then held, that the action of the state court was legislative in character, no appeal lay to this Court from the state court's determination of the federal question. *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 226, 227; *Oklahoma Gas Co. v. Russell*, *supra*. Accordingly, the complainants brought this suit in the Federal Court to enjoin the enforcement of the Commission's order.

It was not until several years later (in 1935) that the Oklahoma Supreme Court decided, in a suit between other parties, that its action in reviewing such an order of the Commission was judicial and not legislative in character. *Oklahoma Cotton Ginners Association v. State*, 174 Okla. 243. The manifest injustice of holding that complainants are bound by the state court's ruling in 1930 as a judicial determination, when at that time under the state court's construction of the state constitution the complainants were not at liberty to treat the ruling as a judicial determination and to obtain a review of the federal question by this Court upon that ground, is not met, as it seems to me, by invoking the general doctrine of *res judicata*.

Whether the judgment of a state court is *res judicata* is a question of state law. The federal courts are not bound to give such domestic judgments any greater force than that awarded them by the courts of the State where rendered. *Union & Planters Bank v. Memphis*, 189 U. S. 71, 75; *Covington v. First National Bank*, 198 U. S. 100, 109; *Wright v. Georgia R. R. & Banking Co.*, 216 U. S. 420, 429. I think that we are not at liberty to assume that the Oklahoma court would so far depart from the plain requirements of justice as to preclude in these circumstances a review of the federal question in a court of competent jurisdiction. The state court has not spoken to that effect and what the state court has said I think clearly imports the contrary.

This appears from its decision in *Oklahoma Gas & Electric Co. v. Wilson & Co.*, 178 Okla. 604. That was an action in the state court on the supersedeas bond given on the appeal to the Supreme Court from the Commission's order in question, and Wilson & Co., the

plaintiff, had judgment. The Supreme Court reversed that judgment and directed a stay pending the determination in this very suit in the federal court of the validity of the Commission's order. The Supreme Court expressly referred to its decision, in 1935, in *Oklahoma Cotton Ginners Association v. State, supra*, that its action in reviewing orders of the Commission affecting rates of public utilities constituted a judicial determination of the questions involved. But instead of holding that the ruling in 1930, upon the order now under review, constituted a final adjudication of the validity of that order, the Supreme Court held that the question of validity was an open one for determination by the federal court in the present suit. After saying that in view of the uncertainty with respect to the "right to a judicial remedy in the state courts," the federal court had acquired jurisdiction of this suit, the state court concluded as follows:

"That remedy was available to them as the only certain method of obtaining a judicial determination of the validity of the commission's order. The suit was a direct attack upon such order, and until its validity was established in that suit, the state court was without jurisdiction to proceed with an action based upon such order. This for the reason that where direct attack in equity is made upon the order of the commission, the defendants' liability on such order is not finally determined judicially until final determination of the equitable action".

If under the state law as thus declared in Oklahoma upon consideration of the particular circumstances of this case, liability on the Commission's order is not finally determined judicially until the determination of that question in this equity suit, I am at a loss to understand how the action of the state court on the 1930 appeal can be regarded as *res judicata* and thus a bar to that determination.

The decree below enjoining enforcement of the Commission's order appropriately followed the determination of its invalidity. The point that the decree should not have gone further and enjoined the prosecution of the action in the state court upon the supersedeas bond is at best only one of technical importance, as the state court itself enjoined such proceedings pending the determination of this suit, apparently in the view that a determination herein of the invalidity of the order would dispose of the merits.

Mr. Justice McREYNOLDS and Mr. Justice ROBERTS join in this opinion.

# SUPREME COURT OF THE UNITED STATES.

No. 19.—OCTOBER TERM, 1939.

Oklahoma Packing Co., formerly Wilson & Co. of Oklahoma et al., Petitioners,

vs.

Oklahoma Gas & Electric Co. et al.

On Writ of Certiorari to the Circuit Court of Appeals for Tenth Circuit.

[January 15, 1940.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

The case concerns a rate controversy which has been winding its slow way through state and federal courts for thirteen years.<sup>1</sup> While the relationship of two utilities with Wilson & Co., a consumer of natural gas, complicates the situation, the legal issues before us may be disposed of as though this were a typical case of a utility resisting an order reducing its rates.<sup>2</sup> Oklahoma Gas & Electric Company (hereafter called Gas & Electric) appealed to the Oklahoma Supreme Court from such an order by the Oklahoma Corporation Commission. The reduction was stayed pending

<sup>1</sup> A history of the controversy is to be found in Oklahoma Gas & Electric Co. v. Wilson & Co., 146 Okla. 272; Oklahoma Gas & Electric Co. v. Wilson & Co., 54 F. (2d) 596; Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 6 F. Supp. 893; Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 292 U. S. 386; Oklahoma Gas & Electric Co. v. Wilson & Co., 178 Okla. 604; Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 100 F. (2d) 770.

<sup>2</sup> Oklahoma Natural Gas Co. and Oklahoma Gas and Electric Co., both engaged in the sale of natural gas in and about Oklahoma City, had agreed to a division of territory. Under that agreement, Wilson & Co. bought gas from Gas & Electric. The Oklahoma Corporation Commission found that Natural Gas had held itself out to provide gas to industrial consumers at a lower rate than that at which Wilson & Co. was able to buy from Gas & Electric. The Commission then ordered Natural Gas to provide Wilson & Co. with its gas at prevailing industrial rates. Both Natural Gas and Gas & Electric resisted the order. Natural Gas contended that it had never held itself out to industrial consumers; Gas & Electric claimed that it was being unconstitutionally deprived of its right to sell to Wilson & Co. at the higher rate. If, pending appeal from the Commission, the order were not stayed, Wilson & Co. would have been able to purchase gas from Natural Gas at the lower rate and Gas & Electric would have been forced either to lower its rates to meet the competition or to lose the business.

the appeal, but to protect Wilson & Co. against a potential overcharge, Gas & Electric gave a supersedeas bond. Gas & Electric lost its appeal, *Oklahoma Gas & Electric Co. v. Wilson & Co.*, 146 Okla. 272, and Wilson & Co. brought suit on the bond. That suit was instituted on December 3, 1931, in one of the district courts of Oklahoma. To enjoin prosecution of the latter suit Gas & Electric on May 20, 1932, invoked the jurisdiction of the United States District Court for the Western District of Oklahoma.<sup>3</sup> After a complicated series of moves in both state and federal courts, not necessary here to detail, this relief was granted by the District Court on September 10, 1937, and on December 19, 1938, sustained by the Circuit Court of Appeals. *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 100 F. (2d) 770. Since the case in part was in conflict with the Second Circuit's decision in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 103 F. (2d) 765, and also presented novel aspects of important questions of federal law, we granted certiorari, 307 U. S. —. We are not concerned with the merits of the Commission's order.

At the threshold we are met by the procedural objection, seasonably made, that Wilson & Co., a Delaware corporation, was improperly sued in the District Court of the Western District of Oklahoma. The objection is unavailable. Prior to this suit, Wilson & Co. had, agreeable to the laws of Oklahoma, designated an agent for service of process "in any action in the State of Oklahoma." Both courts below found this to be in fact a consent on Wilson & Co.'s part to be sued in the courts of Oklahoma upon causes of action arising in that state. The Federal District Court is, we hold, a court of Oklahoma within the scope of that consent, and for the reasons indicated in *Neirbo Co. et al. v. Bethlehem Shipbuilding Corp.*, decided November 22, 1939, *ante* p. —, Wilson & Co. was amenable to suit in the Western District of Oklahoma.

Petitioners further urge (1) that their plea of *res judicata* should have been sustained, and (2) that § 265 of the Judicial Act (Act

<sup>3</sup> In 1928 Natural Gas complied with the order; and since that time Wilson & Co. has been buying gas at the lower rate prescribed by the Commission. The sole question now involved in these proceedings is the liability of Gas & Electric to Wilson & Co. for alleged overcharges between 1926 and 1928. The District Court found specifically that the Corporation Commission had made no threat to enforce penalties for violations of the 1926 order, and as to the Commission, declined to grant any injunctive relief. Cf. *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U. S. 386, 390.



of March 3, 1911, 36 Stat. 1162, 28 U. S. C. § 379, derived from § 5 of the Act of March 2, 1793, 1 Stat. 333, 335), was a bar to the suit.

The claim of *res judicata* is based on the prior determination in 1930 by the Supreme Court of Oklahoma that the contested order of the Corporation Commission was valid. *Oklahoma Gas & Electric Co. v. Wilson & Co.*, 146 Okla. 272. The pronouncements of the Oklahoma Supreme Court concerning the character of such a determination—whether under the Oklahoma Constitution it was a “legislative” or “judicial” review—have for a time, however, been ambiguous and fluctuating. After the present bill was filed but before the challenged injunction was decreed, the Oklahoma Supreme Court had held that its decision in cases like that of *Oklahoma Gas & Electric Co. v. Wilson & Co.*, was a judicial judgment. *Oklahoma Cotton Ginners’ Association v. State*, 174 Okla. 243. But, in *Community Natural Gas Co. v. Corporation Commission*, 182 Okla. 137, decided after the decree here in issue, the Oklahoma court formally characterized its review in cases prior to the decision in the *Ginners’* case as “legislative”, refused to give that decision retroactive effect, and therefore deemed the *res judicata* doctrine inapplicable to these prior reviews. Hence, the plea of *res judicata* in this case must fail, for on that issue state law is determinative here. *Union and Planters’ Bank v. Memphis*, 189 U. S. 71; *Covington v. First National Bank*, 198 U. S. 100; *Wright v. Georgia R. R. and Banking Co.*, 216 U. S. 420.

There remains, therefore, the applicability of § 265 of the Judicial Code.<sup>4</sup> That provision would operate as a bar upon the power of the District Court to enjoin proceedings previously brought in the state court on the supersedeas bond, if “the only thing sought to be accomplished by this equitable action” is to stay the continuance of that action. Such was the construction placed upon the bill by the earlier District Court of three judges, and such was this Court’s assumption when the latter decision came here on appeal. *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 6 F. Supp. 893, 895; *Oklahoma Gas & Electric Co. v. Oklahoma Packing*

<sup>4</sup>Section 265 provides: “The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.”

4 *Oklahoma Packing Co. et al. vs.*

*Oklahoma Gas & Electric Co. et al.*

Co., 292 U. S. 386, 389. That case eliminated the Corporation Commission as party to the litigation. The District Court to which this Court remanded the matter summarized Gas & Electric's claim by way of answer to the action brought by Wilson & Co. in the state court as an attack upon the Commission's order "for substantially the same reasons as set out" in the present bill.

The present suit, therefore, is one for an injunction "to stay proceedings" previously begun in a state court. The decree below is thus within the plain interdiction of an Act of Congress, and not taken out of it by any of the exceptions which this Court has heretofore engrafted upon a limitation of the power of the federal courts dating almost from the beginning of our history and expressing an important Congressional policy—to prevent needless friction between state and federal courts. Compare *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239; *Simon v. Southern Railway*, 236 U. S. 115; *Wells Fargo & Co. v. Taylor*, 254 U. S. 175. See Warren, "Federal and State Court Interference", 43 Harv. L. Rev. 345, 372-77. That the injunction was a restraint of the parties and was not formally directed against the state court itself is immaterial. *Hill v. Martin*, 296 U. S. 393, 403. Cf. *Kohn v. Central Distributing Co.*, 306 U. S. 531. *Steelman v. All Continent Corp.*, 301 U. S. 278, pressed upon us by respondents and relied upon below, is plainly inapplicable.

Neither record nor findings below give any other basis for injunctive relief save the threatened injury implied in the state court lawsuit; and that could not be enjoined. The decree below is reversed, with directions to dismiss the bill.

*Reversed.*

The CHIEF JUSTICE, Mr. Justice McREYNOLDS and Mr. Justice ROBERTS adhere to the views expressed in their separate opinion in this case.

*in rear of opinion dated 12/4/39*  
A true copy.

Test:

Clerk, Supreme Court, U. S.



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